

# PENDING NOMINATIONS

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## HEARING

BEFORE THE

### COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

**STEPHEN L. JOHNSON** TO BE ADMINISTRATOR, U.S. ENVIRONMENTAL  
PROTECTION AGENCY

**LUIS LUNA** TO BE ASSISTANT ADMINISTRATOR FOR ADMINISTRATION  
AND RESOURCE MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION  
AGENCY

**JOHN PAUL WOODLEY, JR.,** TO BE ASSISTANT SECRETARY OF THE  
U.S. ARMY FOR CIVIL WORKS

**MAJOR GENERAL DON T. RILEY** TO BE MEMBER AND PRESIDENT OF  
THE MISSISSIPPI RIVER COMMISSION, U.S. ARMY

**BRIGADIER GENERAL WILLIAM T. GRISOLI** TO BE MEMBER OF THE  
MISSISSIPPI RIVER COMMISSION, U.S. ARMY

**D. MICHAEL RAPPOPORT** TO BE MEMBER OF THE BOARD OF  
TRUSTEES OF THE MORRIS K. UDALL FOUNDATION

**MICHAEL A. BUTLER** TO BE MEMBER OF THE BOARD OF TRUSTEES  
OF THE MORRIS K. UDALL FOUNDATION

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APRIL 6, 2005

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED NINTH CONGRESS  
FIRST SESSION

JAMES M. INHOFE, Oklahoma, *Chairman*

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GEORGE V. VOINOVICH, Ohio  
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KEN CONNOLLY, *Minority Staff Director*

# C O N T E N T S

Page

**APRIL 6, 2005**

## OPENING STATEMENTS

Baucus, Hon. Max, U.S. Senator from the State of Montana .....	12
Bond, Hon. Christopher S., U.S. Senator from the State of Missouri .....	7
Boxer, Hon. Barbara, U.S. Senator from the State of California .....	6
Carper, Hon. Thomas R., U.S. Senator from the State of Delaware .....	16
Chafee, Hon. Lincoln, U.S. Senator from the State of Rhode Island .....	18
DeMint, Hon. Jim, U.S. Senator from the State of South Carolina .....	9
Inhofe, Hon. James M., U.S. Senator from the State of Oklahoma .....	1
Isakson, Hon. Johnny, U.S. Senator from the State of Georgia .....	6
Jeffords, Hon. James M., U.S. Senator from the State of Vermont .....	4
Lautenberg, Hon. Frank R., U.S. Senator from the State of New Jersey .....	9
Lieberman, Hon. Joseph I., U.S. Senator from the State of Connecticut .....	18
McCain, Hon. John, U.S. Senator from the State of Arizona, prepared state- ment .....	58
Murkowski, Hon. Lisa, U.S. Senator from the State of Alaska .....	11
Obama, Hon. Barack, U.S. Senator from the State of Illinois .....	9
Voinovich, Hon. George V., U.S. Senator from the State of Ohio .....	14

## WITNESSES

Butler, Michael, Nomination by the President to be a Member of the Board of Trustees of the Morris K. Udall Foundation .....	158
Grisoli, Brigadier General William T., nominated by the President to be a member of the Mississippi River Commission .....	44
Prepared statement .....	153
Responses to additional questions from:	
Senator Inhofe .....	155
Johnson, Stephen L., nominated by the President to be Administrator, U.S. Environmental Protection Agency .....	20
Prepared statement .....	59
Responses to additional questions from:	
Senator Baucus .....	106
Senator Bond .....	65
Senator Boxer .....	115
Senator Carper .....	124
Senator Chafee .....	68
Senator Clinton .....	125
Senator Inhofe .....	62
Senator Jeffords .....	76
Senator Lautenberg .....	136
Senator Lieberman .....	108
Senator Murkowski .....	70
Senator Obama .....	139
Senator Thune .....	74
Senator Vitter .....	75
Senator Voinovich .....	67
Luna, Luis, nominated by the President to be Assistant Administrator for Administration and Resource Management, Environmental Protection Agency .....	42
Prepared statement .....	141
Responses to additional questions from Senator Inhofe .....	142

#### IV

	Page
Rappoport, D. Michael, nominated by the President to be a member of the Board of Trustees of the Morris K. Udall Foundation .....	45
Prepared statement .....	155
Responses to additional questions from:	
Senator Inhofe .....	157
Senator Jeffords .....	157
Riley, Major General Don T., nominated by the President to be a member and president of the Mississippi River Commission .....	44
Prepared statement .....	149
Responses to additional questions from:	
Senator Inhofe .....	151
Senator Vitter .....	151
Woodley, Jr., John Paul, nominated by the President to be a Assistant Secretary of the Army for Civil Works .....	43
Prepared statement .....	142
Responses to additional questions from:	
Senator Baucus .....	147
Senator Inhofe .....	143
Senator Jeffords .....	143
Senator Lautenberg .....	148
Senator Vitter .....	148

#### ADDITIONAL MATERIAL

Articles:	
Critics Say EPA Would Have Harmed Low-Income Children, NewStandard, Catherine Komp .....	31
Experimenting on Children, St. Petersburg Times .....	32
Playing With Poison; EPA Pesticide Research Doesn't Pass the Smell Test .....	33
Charts:	
Contractor CHEERS Telephone Screening Summary .....	119
NESCAUM .....	3
Letters from:	
Benjamin H. Grumbles.....	83, 86, 90
Senator Clinton .....	135
Senator Lugar .....	39
Senator Sarbanes .....	81
Several Senators .....	85
Stephen Johnson .....	111

## PENDING NOMINATIONS

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WEDNESDAY, APRIL 6, 2005

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

The Committee met, pursuant to other business, at 9:15 a.m. in room 406, Dirksen Senate Building, Hon. James M. Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Warner, Bond, Voinovich, Chafee, Murkowski, Thune, DeMint, Isakson, Jeffords, Baucus, Lieberman, Boxer, Carper, Clinton, Lautenberg, and Obama.

### OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. The meeting will come to order. We will go ahead and get started.

Let me mention, Mr. Johnson, I understand we have a vote at 10 o'clock. They will hold it open, I think, for a little bit longer. So I'd like to go right up until 10:15 or so, and then of course you know we have a joint session of the legislature, Senator Jeffords, that we will have to attend. It is the wish of the Chair that we dispose of Stephen Johnson's portion of the hearing during that first hour, then we will come back at—what, 2:30 for the others.

So with that, in order to accommodate some of the requests that we have had from both sides of the aisle, I am going to forego my opening statement and my questions in order to accommodate the request for two rounds of questions in hopes that we can do this by 10:20 or so.

I do want to welcome all the nominees here today. We do have Steve Johnson, who has been before us. He has been confirmed twice before this committee. He has already appeared in the budget hearing this year, so he is not a stranger to this. We have Luis Luna, John Paul Woodley, General Riley, General Grisoli and Michael Rappoport that will be here for the second time. We may have time to get started with them at the end of this, but I suspect that will not be the case.

Before we have opening statements, I would like to have you respond to the required questions of all nominees, if you would, please. You may stand to do this. Are you willing to appear at the request of any duly constituted Committee of Congress as a witness?

[Witnesses respond in the affirmative.]

Senator INHOFE. Do you know of any matters which you may or may not have thus far disclosed that might place you in any conflict of interest if you are confirmed to this position?

[Witnesses respond in the negative.]

Senator INHOFE. Thank you.

Mr. Johnson, you may be seated.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE  
STATE OF OKLAHOMA

I want to welcome all of our nominees to today's hearing. Today we will be considering a number of nominations; including Steve Johnson to be the Administrator of the Environmental Protection Agency; followed by a second panel where we will have 5 additional nominees to hear from: Luis Luna, to be EPA's Assistant Administrator for Administration and Resource Management; John Paul Woodley, Jr., to be Assistant Secretary of the Army for Civil Works; Major General Don Riley, to be a Member and President of the Mississippi River Commission; Brigadier General William T. Grisoli, to be a Member of the Mississippi River Commission; and D. Michael Rappoport, to be a Member of the Board of Trustees of the Udall Foundation.

Mr. Johnson, welcome again to this committee. This is the third time during this Administration that you have appeared before the committee as a nominee for a post at EPA first for an Assistant Administrator spot; then to be Deputy Administrator; and now for the top job. I would note that each time you were confirmed without opposition and I have no reason to believe that this time will be any different.

I do want to briefly touch a couple of very important issues: First is of course the Tar Creek Superfund Site in Oklahoma. I want to thank you and the Agency for the ongoing work at the Tar Creek Superfund Site and I will be asking for your commitment that it remain the top priority for EPA.

The second issue that I would like to bring up is that of EPA grants. Last year, the committee held the first oversight hearing into grants management at the EPA. EPA has taken some positive steps. Not only is EPA now competing discretionary grants for the first time, it has created a new website with information on grant recipients; developed a new results policy with measurable outcomes; and enacted new oversight to avoid funding political activities.

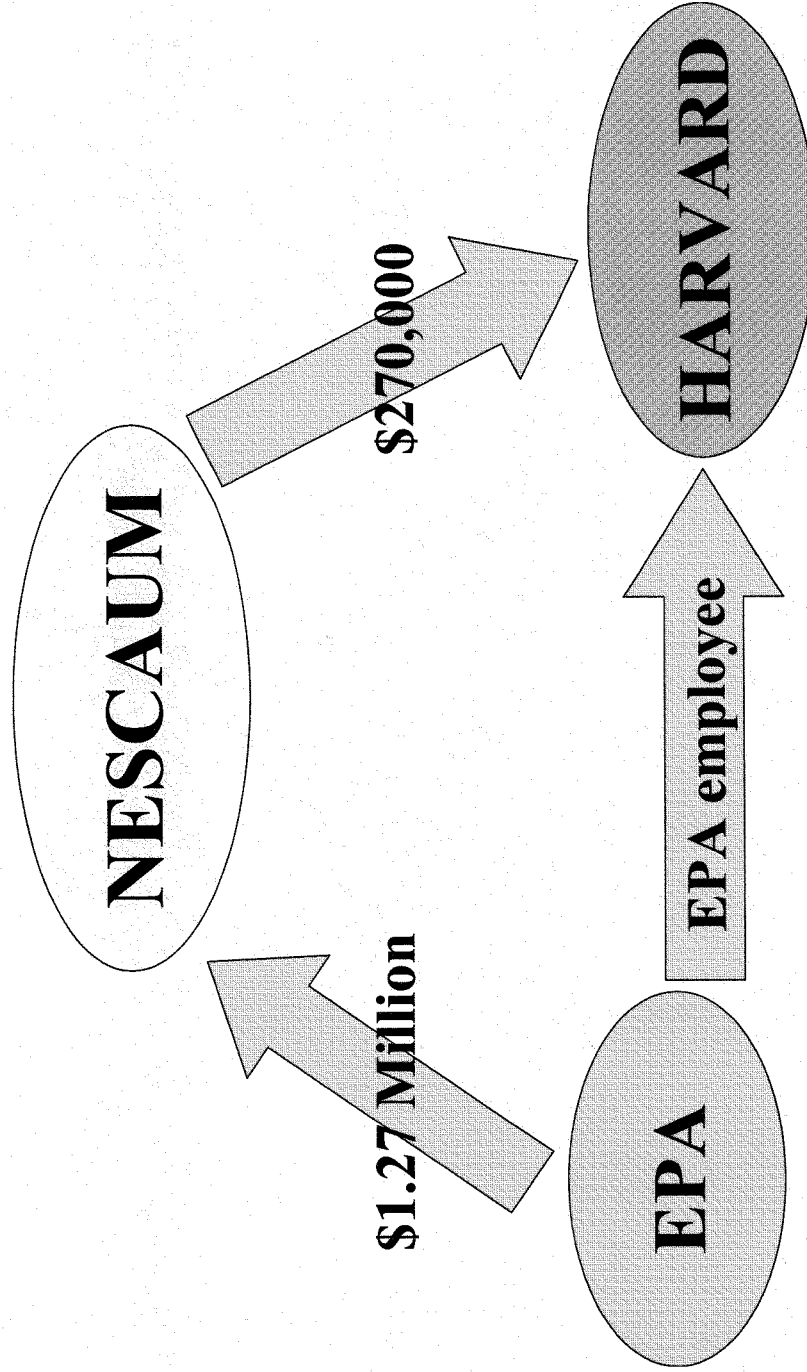
However, new policies are not enough. Real reform of grants management requires the attention of the highest levels at EPA. We continue to observe different practices and problems which causes me great concern. One recent example involves the Harvard Mercury study which has been in the news over the last few weeks. While most of the criticism has centered around the fact that the EPA received the study too late to be used in the mercury MACT regulation, I am concerned about another issue.

On February 1st of this year, I wrote a letter to EPA asking for more information about the grant which funded the research. While my staff continues to look into this particular case, I am concerned about the overall process for these types of grants. Apparently, EPA funded this research, through a third party (in this case NESCAUM), to Harvard where an EPA employee on leave conducted most of the work. This was done without competition, and signed off on by career staff at EPA. I want to know if there was a personal or professional connection between the employees, and how often are current EPA employees the beneficiaries of EPA grant money.

In the preliminary documents we have received from the EPA it appears that when the money was given to NESCAUM, it was with the understanding that they would contract out the work. This chart shows the connections between the various parties. While this might be a completely innocent arrangement, I do have a number of unanswered questions regarding these transactions. I want to know what the understanding was between EPA and NESCAUM; I want to know what the understanding was when the EPA employee took leave to work on his PHD dissertation at Harvard; was there an understanding that he would be funded by a non-competitive EPA grant? We must have more accountability in the EPA grant process.

Once again, I want to thank all of the nominees for being here today.

[The chart referred to follows:]



Senator INHOFE. I want to welcome our second panel and thank you all for joining here today as we consider your nominations. On this panel we have: Luis Luna; John Paul Woodley, Jr.; Major General Don Riley; Brigadier General William T. Grisoli; and D. Michael Rappoport.

Regarding the Army Corps and Mr. Woodley there has also been some recent press involving the Florida Everglades and the lack of progress. Apparently the St. Petersburg Times obtained an internal Corps memo by Gary Hardesty here in the DC office. In the memo, Mr. Hardesty gives a very frank and honest appraisal of ongoing concerns with the project. I hope the report to Congress due later this year is equally frank. I would point out one incorrect observation in the memo; my staff and I have in fact been closely following the developments on the Everglades and I regret that my predictions about cost overruns are turning out to be true. It is my intention to hold a formal hearing on the Everglades as soon as the report is submitted to Congress, and I want an assurance from Mr. Woodley that the report will not be late.

I want to note for the record, that next week when the committee votes to report today's nominees, we will also be voting Michael Butler, who has been nominated to be a Member of the Board of Trustees of the Udall Foundation. Because the Udall Board is a part-time position and most of the expenses are paid for by the individual, the committee has historically provided Udall nominees with the option of a hearing. While Mr. Butler will not be here, he has provided testimony that will be included in the record. He has answered the required committee questions.

Senator INHOFE. With that, I will go ahead to Senator Jeffords first.

**OPENING STATEMENT OF HON. JAMES M. JEFFORDS,  
U.S. SENATOR FROM THE STATE OF VERMONT**

Senator JEFFORDS. Thank you, Senator Inhofe. Good morning and welcome to all of our nominees.

Mr. Johnson, you are before this committee again, this time as the President's nominee for the most important environmental position in the Government, Administrator of the Environmental Protection Agency. As a scientist, you have the responsibility to put policy before politics, to put public health before corporate profits, and to put the long term needs of the environment before the short term needs of special interests.

As a long-time EPA employee, you have tremendous experience and expertise for this job. The question today is whether you have the fortitude to stand up against powerful interests to protect our air, our water and our land. The EPA Administrator should not be a rubber stamp for the White House policy. You have a great opportunity to bring a fresh approach to EPA, one that I say is badly needed.

As you know, I, along with other members of the committee, have a number of outstanding information requests that EPA has yet to fulfill. Some of these requests date back to 2001. The Administration's continued obstruction and stonewalling on these legitimate requests has made it impossible for Congress to do any sort of oversight or to craft consensus legislation. The Agency, at the instruction of the White House, has persisted in obstructing our legitimate inquiry into facts and analysis that this committee needs to do its job. I hope we can get your commitment today to help us get this information soon.

You have also signed the now infamous mercury rule. That was a serious mistake in my mind, and I and many Senators of both parties advised you and former Administrator Leavitt against doing it. The Bush administration relied on the notion that the



United States is only a small part of the global problem, so we shouldn't bother taking aggressive action domestically.

Somewhere between 30 and 60 percent of the mercury that falls on Vermont comes from U.S. sources. That is not insignificant. A grossly hypocritical U.S. representative at international meetings has blocked more aggressive action on a global level. Our once prominent leadership on environmental matters has become a joke around the world. Mr. Johnson, you have quite a job ahead to restore the Agency's credibility here and abroad, if it can be done.

I would also like to welcome back to the committee John Paul Woodley, the President's nominee to be Assistant Secretary of the Army for Civil Works, and look forward to your statement.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE  
STATE OF VERMONT

Good morning and welcome to all of our nominees. Mr. Johnson, you are before this committee again, this time as the President's nominee for the most important environmental position in this government - Administrator of the Environmental Protection Agency. While you have an obligation to serve the Bush administration, your greater responsibility will be as the guardian for the environment for all Americans.

The EPA needs a strong, independent leader who is not afraid to speak his mind and bring balance to the Bush administration's attempts to move our nation backwards on environmental protection. As a scientist, you have a responsibility to put policy before politics, to put public health before corporate profits, and to put the long term needs of the environment before the short term needs of special interests.

As a longtime EPA employee, you bring tremendous experience and expertise to this job. The question today is whether you have the fortitude to stand up against powerful interests to protect our air, our water and our lands. The EPA Administrator should not be a rubber-stamp for White House policies. You have a great opportunity to bring a fresh approach to the EPA, one I must say is badly needed.

As you know, I, along with other members of this committee have a number of outstanding information requests that EPA has yet to fulfill. Some of these requests date back to 2001. The Administration's continued obstruction and stone-walling on these legitimate requests has made it impossible for us in Congress to do any sort of oversight or to craft consensus legislation. The Agency, at the instruction of the White House, has persisted in obstructing our legitimate inquiry into facts and analysis that this committee needs to do its job. I hope we can get your commitment today to help us get this information soon.

You also signed the now infamous mercury rule. That was a serious mistake that I and many Senators of both parties advised you and former Administrator Leavitt against doing. The Bush administration relied on the notion that the United States is only a small part of the global problem so we shouldn't bother taking aggressive action domestically. Somewhere between 30 and 60 percent of the mercury that falls on Vermont comes from U.S. sources. That is not insignificant. And, it is grossly hypocritical when U.S. representatives at international meetings have blocked more aggressive action on the global level.

Our once-prominent leadership on environmental matters has become a joke around the world. Mr. Johnson, you have quite a job ahead to restore the Agency's credibility here and abroad. If it can be done.

I would also like to welcome back to the committee John Paul Woodley, the President's nominee to be Assistant Secretary of the Army for Civil Works and look forward to your statement. Mr. Luna, Major General Riley, Brigadier General Grisoli, and Mr. Rappoport, I believe this is a first time for each of you before this committee and I look forward to your statements as well.

Thank you.

Senator INHOFE. Thank you, Senator Jeffords.  
Senator INHOFE. Senator Isakson.

**OPENING STATEMENT OF HON. JOHNNY ISAKSON,  
U.S. SENATOR FROM THE STATE OF GEORGIA**

Senator ISAKSON. Mr. Chairman, in respect to the desire to have two rounds of questions, I'll waive any opening statement, except to acknowledge the cooperative spirit and timely response I've always received from Mr. Johnson and welcome him here today.

[The prepared statement of Senator Isakson follows:]

STATEMENT OF HON. JOHNNY ISAKSON, U.S. SENATOR FROM THE  
STATE OF GEORGIA

Thank you Mr. Chairman. I want to welcome our nominees to the committee today, and congratulate them on their appointments. I look forward to hearing from them views on pertinent issues and their visions for their respective roles. We have a lot to discuss today so, in an effort to expedite getting to the nominee statements and question and answer period, I will yield back at this time.

Senator INHOFE. Well, thank you, Senator Isakson.  
Senator Boxer.

**OPENING STATEMENT OF HON. BARBARA BOXER,  
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. I will withhold an opening statement and hope I can have enough time to question.

Senator INHOFE. I appreciate that. We are going to try to dispose of the first item prior to having to leave to vote and for the joint session.

Senator BOXER. I would like to put a statement into the record, however.

Senator INHOFE. Of course, we will put that into the record.  
[The prepared statement of Senator Boxer follows:]

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE  
STATE OF CALIFORNIA

Mr. Chairman, a reasonable opportunity to question the nominees and to receive answers to those questions is at the heart of our constitutional role of advice and consent. We owe it to the people we represent to have a full debate before we move forward. Because our time is limited, I will focus today on a few critical issues. But the few minutes we have today cannot be the end of the debate in this committee.

The nomination for Administrator of EPA is one of the most important we consider in this committee. EPA's mission to protect human health and the environment, including those most vulnerable to pollution's effects, plays a key role in the quality of life in every community in this country. This is a subject worthy of serious discussion, especially in light of the direction that EPA has taken. We have seen rollback after rollback at the expense of the health of our families and the environment. We cannot afford to continue this way.

One of the issues I want to focus on today, and Mr. Johnson has played a key role in this issue as I understand it, is the issue of human testing and pesticides, including testing on children.

Pesticides are dangerous by design. They are designed to kill biological organisms. Because of this danger, federal law prohibits them from being labeled or called "safe."

Children are especially vulnerable to pesticides. The USEPA, National Academy of Sciences, and American Public Health Association, among others, have stated this and treat it as accepted fact. Pesticides can cause cancer and adversely affect a child's neurological, reproductive, respiratory, immune, and endocrine systems, even at low levels. It is also my understanding that EPA's new cancer risk assessment guidelines for early life exposure finds that children under two may have a tenfold increase in risk from cancer causing substances.

I am very concerned about any EPA program that would allow human testing of pesticides. Testing of pesticides on children is an even greater concern. The moral and ethical issues involved in such a program are very serious. I intend to question

Mr. Johnson very carefully about any such programs or plans, including the EPA's Children's Environmental Exposure Research Study.

Another serious concern is the Mercury rule that EPA issued just last month that fails to protect human health, including children.

In 2000, EPA made a finding that it was necessary and appropriate to strictly regulate mercury emissions from utilities due to the public health and environmental threat posed by this source of hazardous air pollution. This finding required that maximum achievable control technologies be applied due to the serious nature of the hazard. The finding was reversed by EPA last month in an action approved by Mr. Johnson, the nominee for Administrator before us today. I am sorry to say this was not a good start on the job.

The original finding was the correct finding and the reversal is not supported by the law or the facts. Maternal consumption of unsafe levels of mercury in fish can cause neurodevelopmental harm in children, resulting in learning disabilities, poor motor function, mental retardation, seizures, and cerebral palsy.

EPA's failure to fully consider key studies showing cardiovascular and other health threats from mercury emissions from power plants, including a Harvard study and an internal EPA study raises serious questions about whether sound science was relied on in putting together this weak rule. The failure to address those findings is even more troubling in light of information I have received that EPA officials scuttled planned meetings with leading experts on cardiovascular effects of mercury before the rule was issued. The best way to remedy this seriously flawed outcome is to stay the rule for reconsideration.

I also have questions about the Administrations plans to address the shortfalls in the Superfund program. The President's budget falls far short of what is necessary to address the growing backlog of toxic sites around the country. While the President's budget proposes \$32 million more than enacted this year, it is over \$100 million less than what he asked for last year. The Administration has acknowledged the backlog of sites, but there are no plans to address it. According to EPA's own internal documents, the backlog of cleanup dollars needed could reach \$750 million to \$1 billion by next year. This program cannot be ignored as the problems grow worse and worse. There are families in this country living with toxic waste in their backyards real people, including kids are getting hurt and it needs to stop.

EPA plays a central role in these issues and the nominee for Administrator must be prepared to address these problems. A full opportunity to question Mr. Johnson is more than a reasonable request. It is what we were sent here to do.

Senator INHOFE. Senator Bond.

**OPENING STATEMENT OF HON. CHRISTOPHER S. BOND,  
U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator BOND. Thank you very much, Mr. Chairman. Unfortunately, I have potentially three other conflicts this morning. So I am not going to waive my opening statement. There are a couple of things I do want to say and questions I want to pose in case I can't be here.

But I appreciate your holding this hearing. The Administrator of the U.S. Environmental Protection Agency is very important, and I've had an opportunity to get to know Stephen Johnson, and know that as a dedicated career civil servant, devoted to the Nation and the cause of the Environmental Protection Agency he can do an excellent job. As a scientist by training, he knows the vital role that science plays in assisting policymakers to make their decisions.

Sound science is not just a catch phrase, it's not just a throw-away line. Sound science is more than just an outlook. It should be more than just a way of doing business. It should be at the heart of every decision the Agency makes.

I was a little bit shocked to hear criticism of the mercury rule, which people have talked about for a long time. I'm from Missouri, talk's enough. Show me. Finally, for the first time, the Agency has come forward with a mercury rule. Please correct me if I'm wrong, but I understand that the mercury reductions required by the

EPA's Clean Air Interstate Rule and the Clean Air Mercury Rule will adequately address the mercury human health threat from power plants and Clear Skies is more than enough and absolutely essential.

But as a career employee, you know that no matter what you do, you're going to be criticized, sometimes on the basis of personal, political interests, sometimes on the basis of unsound environmental hysteria. But you have been in the position of putting your heart and soul into advancing the program, advocating the positions, and we appreciate what you and your staff have done and are doing. As a scientist, you know that EPA decisions must be made more in the heart more than pure desire and more than just belief. Sound science is the mind that goes with the heart.

I would ask you perhaps in case I'm not here to ask a question to give us your analysis of which will produce a greater amount of air pollution reduction and thus be better for the environment. We have a choice: one, litigation against a few individual power plants; two, legislation covering 1,110 power plants and mandating 70 percent pollution reductions from the entire industry. This is really a trick question, but you might address that, so we know whether litigation or legislation is going to be more effective in cleaning up the environment.

Finally, I would like to welcome Mr. Woodley back to the committee. I think it's vitally important we have leadership for the Corps. I've never yet found an assistant secretary who did half of what I wanted a secretary to do, which is not because I'm always right, it's because they have a great deal to balance and a very difficult job balancing the interests and the inter-agency disputes.

Furthermore, because the Corps is within the Department of Defense, there is effectively no Cabinet-level voice. Depriving the Corps of an assistant secretary leaves them blowing in the wind, run only by the Office of Management and Budget. I think we can agree on a bipartisan basis that that is the worst possible option. If any of my friends from OMB are here, I'd be happy to discuss that with you. If you're not here, please send them a letter. We would like to see an assistant secretary who runs it, and I think John Paul Woodley is thoughtful, responsive, capable of telling me and others no, and he has proven to be patient. I think he deserves the Senate's approval.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Bond. I'm glad you brought up the thing on mercury, because it is so frustrating, we see ads run in the New York Times saying, "This President is reducing mercury standards," when he has established it first.

Senator BOND. Wasn't he the first? Had anybody taken a step?

Senator INHOFE. No one had.

Senator BOND. He's done something, absolutely. Isn't there a country music song, "I want a little less talk and a lot more action"?

Senator INHOFE. We're running out of time here.

[Laughter.]

Senator INHOFE. Senator Obama.

**OPENING STATEMENT OF HON. BARACK OBAMA,  
U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator OBAMA. Not sure I can follow up on that.

Thank you very much, Mr. Chairman. I am going to save my time for questions, but I very much appreciate Mr. Johnson's being here and we all look forward to hearing his testimony.

STATEMENT OF HON. BARACK OBAMA, U.S. SENATOR FROM THE STATE OF ILLINOIS

Mr. Chairman, I will be brief so that the opportunity for my colleagues to ask questions will be maximized.

I would like to begin by thanking the Chairman for conducting this hearing. I would also like to thank the nominees for appearing before the committee today during this informational session, and to congratulate them on their nominations to serve the United States in these various capacities.

I appreciate having the opportunity to hear from Mr. Stephen Johnson, who has been nominated to serve as the Administrator of the Environmental Protection Agency. As the nominee knows, given the size and diversity of my state, we have a wide range of issues that fall under EPA jurisdiction, whether it is agriculture, coal, water and land resources, and the like, so I look forward to hearing his presentation and to having the opportunity to present questions for his response.

I also am appreciative to have the John Paul Woodley appear before the committee today for nomination for the position of Secretary of the Army for Civil Works. As my colleagues know, there are three major rivers in my state—the Illinois, the Mississippi, and the Ohio—as well as Lake Michigan, and we rank among the top states in the nation in waterborne commerce, of which the Corps has a significant role. I will be interested in learning his views on the lock and dam investments along the Mississippi River and Illinois Waterway, which I support, as well as his views regarding the delayed funding associated with the McCook and Thornton Reservoirs in Chicago. I look forward to his presentation.

Finally, I would like to acknowledge the nominees for the Morris K. Udall Foundation and the Mississippi River Commission who have come before the committee today. Thank you for taking the time to present your credentials.

Senator INHOFE. Thank you.

Before some of you arrived, we had commented, we were going to try to have this first panel disposed of prior to the time that we have to go vote and then go on to the joint session. So I appreciate that cooperation very much, Senator Obama.

Senator DeMint.

**OPENING STATEMENT OF HON. JIM DEMINT, U.S. SENATOR  
FROM THE STATE OF SOUTH CAROLINA**

Senator DEMINT. Thank you, Mr. Chairman. I will not make an opening statement, only to say that particularly with Mr. Johnson, I appreciate his willingness to work with us on some difficult issues in my State. He has been very responsive and I look forward to the questions and answers today.

Senator INHOFE. Thank you, Senator DeMint.

Senator Lautenberg.

**OPENING STATEMENT OF HON. FRANK R. LAUTENBERG,  
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Mr. Chairman, I won't be quite as brief as you hope, but I'm not going to take much time. I have had a chance to meet with Mr. Johnson and learn a lot more about his views and have great respect for his professionalism and his capability and capacity to do this job. The only thing I see is that he's going to be forced to do some of this work with one hand tied behind his back. That's my statement, not his.

But I don't see the resources available to get the things done that we'd like to, particularly whether it's drilling in the ANWR or the mercury rule that the Chairman and our colleague from Missouri seem to be so happy about. The fact of the matter is, it's going to cause larger deposits of mercury in the State of New Jersey in the years past 2009, according to EPA. We don't like that, and we would hope that there is something we could do to prevent it. Highly toxic material, we don't need any more of that. New Jersey gets punished because it's east of some of the States that help produce it from their plants.

So we looked at something like the Superfund program, a program that I've been involved in since 1983, and we were making great progress, sites were being cleaned up. People who were responsible for the pollution were largely paying the price. But now without any income coming from those who might create the pollution in the first place, we are looking at sites that, if they are orphaned as a result of not being able to find a responsible party, they could lie dormant or worse, active poisonous sites for a long time to come.

Last, I was concerned about the Toxic Substances Control Act, which Mr. Johnson had significant amount of work to do there. It has not been a smashing success. There are thousands of chemicals that have not been really identified, registered as those that we have to be careful of. Nevertheless, once again I reiterate that, Mr. Johnson, I indicated to you in our conversation yesterday, that I was impressed with your record and your integrity. You'll take care of the record, and you don't mind if I look at the integrity along the way in terms of getting the job done.

Again, I'll try to get you another oar to row with, but I don't know how successful I will be.

Mr. Chairman, thank you very much.

[The prepared statement of Senator Lautenberg follows:]

STATEMENT OF HON. FRANK LAUTENBERG, U.S. SENATOR FROM THE  
STATE OF NEW JERSEY

I want to welcome Mr. Johnson and begin by thanking him for the EPA's response to my letter about the Ringwood Superfund site in New Jersey. My state's former governor, Christie Whitman, was the first person to lead the EPA in this Administration. However, it seemed that her hands were usually tied because the Administration wasn't committed to protecting the environment.

Mr. Johnson, you are known as an honorable and capable professional but what I continue to see is that for this Administration the goal of protecting our air, our water, and our other natural resources lies at the bottom of its priority list. From drilling in the Arctic Wilderness, to setting mercury standards written by and for the power industry, this Administration has consistently sided with big business interests that exploit our environment, instead of protecting the interests of America's families.

I hope Mr. Johnson will be able to overcome that record, start with a clean slate and become the kind of champion for the environment that our children and grandchildren deserve.

I want to focus today on three issues of special importance in New Jersey. First, the EPA's new mercury rule. My state is one of nine states suing EPA because this rule fails to protect public health. In fact, according to EPA, New Jersey's mercury emissions under these rules will actually increase between 2009 and 2015.

We've known for at least a decade about the severe and irreversible health effects of mercury exposure, especially to fetuses, infants and children. I hope Mr. Johnson will keep their interests in mind, rather than just the interests of power companies and polluters, if he is confirmed as administrator.

Also, the Superfund program to clean up hazardous waste sites is also in crisis. Since the Superfund tax expired in 1995, funding has declined 34 percent. As a result, a large backlog of hazardous waste sites have not been added to Superfund's priority list, and the cleanup of many other sites has been slowed or put on hold.

Finally, I am very concerned about the Toxic Substances Control Act (TSCA), which was established 29 years ago (1976) to protect public health and the environment from toxic chemicals. It has been an utter failure at achieving this goal.

I look forward to working with Mr. Johnson and the members of this committee to restore and reaffirm the mission and integrity of the EPA. I also look forward to hearing from our other nominees for other vital posts.

Senator INHOFE. Thank you, Senator Lautenberg.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

I will be leaving the committee early this morning, I have another committee meeting, so I will be submitting my questions in writing.

Senator INHOFE. Sure.

**OPENING STATEMENT OF HON. LISA MURKOWSKI,  
U.S. SENATOR FROM THE STATE OF ALASKA**

Senator MURKOWSKI. But I do want to thank you, Mr. Johnson, for the time that we had to discuss some of the issues that are very important in my State, that of the Village Safe Water. We have had a chance to talk a little bit about mercury and fish and some of the others, but again, I appreciate your time.

As I have mentioned to you, there are few agencies that have more influence or more impact on what is happening in the State of Alaska, again, the EPA and the Corps of Engineers. So it's important that we're here this morning, it's important that we will be moving forward your name to take up the head of EPA.

I have repeated so many times that I've forgotten where I've said it and to whom I've said it, but Alaska is so unique in so many ways. One of the things that we struggle with is our regulations that are designed to be one-size-fits-all. We try to make our case and we plead for some exceptions, we plead for some ration within the Agency to look at our situations and allow common sense to prevail.

So I ask you again to work with us on our issues that are distinct, that are unique, and I look forward to the opportunity when we can welcome you up and show you first-hand what's really going on. Thank you for your time this morning and for the time that we have had.

Thank you, Mr. Chairman.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Thank you, Mr. Chairman. I know that we all want to hear from our friends on the other side of the witness table, so I will be very brief, and will focus on our two most senior nominees.

There are very few agencies of our government that have more impact on the citizens of my state than the Environmental Protection Agency and the Corps of Engineers. I am confident that the attention that EPA and Corps employees lavish on Alaskans and Alaska projects has always been well-intentioned. However, while some might argue the point, I cannot say that I think their influence has always been beneficial.

From time to time, on issue after issue, I've noted that Alaska is "unique"—and that because it is unique, it deserves special consideration. Like many western states, we have often struggled with environmental restrictions sought by, imposed

by, and maintained by interests with very little knowledge of the conditions we live with.

We try to address serious issues with clarity and common sense. But all too often, government agencies try to apply one-size-fits-all solutions that simply don't work. Mr. Chairman, what I would LIKE to ask these gentlemen is for a pledge that they will instruct their staffs to avoid the easy answers and to tune their regulatory actions as carefully as the law will allow.

Despite the desperate urgency of some organizations fund-raising letters, the truth is that Americans have made huge strides toward a cleaner, healthier environment, and we've been able to do so without crippling our own economy.

Mr. Chairman, I think it should be clear that if we are to continue to make strides toward a cleaner environment, maintaining a healthy economy must remain a number one concern.

With that, Mr. Chairman, I will yield and look forward to hearing from others. I do have a number of questions, but because I have another commitment, I'd like to submit questions in writing, if there is no objection.

Senator INHOFE. Thank you, Senator Murkowski.

Senator Baucus.

**OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR  
FROM THE STATE OF MONTANA**

Senator BAUCUS. Thank you, Mr. Chairman. I apologize, I will not be able to stay and ask questions. But I will insert them for the record. I do have a statement to make.

I understand we're here to consider several pending nominations, including that of Mr. Stephen Johnson to be the new Administrator of the Environmental Protection Agency, who is obviously here. Mr. Johnson, I was very sorry that we were not able to meet prior to your hearing, but I hope we will be able to sit down together. I make it my practice to do so whenever anyone is nominated for such an important position.

I had great respect for your predecessors, both former Governors. I asked both of them why they wanted the job and whether or not they thought they could stand up to defend the interests of their Agency to the Administration. Unfortunately, neither one of them stayed at the Agency for very long. Perhaps as a career EPA official you have a better idea of what you're getting yourself into and I certainly hope that if confirmed, you'll stick around a while.

Frankly, it's very important for heads of departments and agencies to stay a longer period of time than most do, because we're constantly reshuffling the deck with all these changes that are going on. I very much hope that you will settle down here and help settle the Agency down so we get some professionalism, more professionalism that we now have. Because it's a very, very solid agency, I very much hope that you can do that.

My top priority at the EPA is, as you may know, is Libbey, MT. I'm going to ask for your commitment, as I have your predecessors, to personally visit with me as soon as you possibly can. Seeing is believing, you will get a better sense of what's going on at Libbey when you do personally see Libbey. Your predecessors did personally come and as a consequence, they devoted a large amount of their thought and time and resources to Libbey. It's such a deep problem there, and I very much hope that you will do the same when you're confirmed.

Since they both visited, both your predecessors visited in person, and they had probably the kind of connection with the community that the community expected and wanted to have, too. Too often,



especially in western States, we're a long way from Washington, DC, there is a very deep sense that, oh, those folks in Washington, they don't care about us, they're so far away, what do they know about our problems, just a bunch of bureaucrats back there.

But when Governor Leavitt showed up and when Governor Whitman showed up, EPA administrators, it made a huge difference. The people there began to say, hey, somebody does care, and maybe they're going to get it. When the EPA followed up, a very, very good person there, made that connection, because after all, we're all public servants. We all work for the people in Montana, as well as all other Americans and all the other problems of this country.

We have to show that we are the employees and they are the employers. By showing up, we actually do so. I again urge you to come to Libbey. We'll talk about specific issues when we get a chance to meet privately.

Mr. Chairman, I also understand this committee will later consider the nomination of John Woodley to be the Assistant Secretary of the Army for Civil Works. As you may know, I opposed Mr. Woodley's nomination previously, because I was not satisfied that you would adequately protect Montana's interests on the Missouri River. The President used his recess appointment, however, to appoint Mr. Woodley for the remainder of the 108th Congress, that was back in 2003. We are now headed into our seventh year of drought in Montana, and I might say the situation looks even worse now than it did then.

Fort Peck Lake and other Upper Missouri River Basin reservoirs are disastrously low, so low, in fact, we will likely hit the magic number of 31 million acre feet of system storage by March of next year. Finally, finally, finally at this number the Corps will preclude navigation on the Lower Missouri River. Fort Peck was long ago devastated by low water levels. Every foot the lake drops further just increases the pain. Frankly, I wish that Mr. Woodley could come out and see Fort Peck Lake.

Our recreation industry has been hit hard, as we have lost most access to the lake and businesses have shut their doors. All this in turn hurts our local communities and our economies.

There are growing concerns about water and power supply along the Missouri as the drought continues. The benefits of navigation as compared to recreation on the Missouri are very small. However, the benefits of navigation are absolutely dwarfed by those of water and power supply. If we have foolishly drained our reservoirs over the past several years in the mistaken belief that we are only hurting recreation in a few Upper Basin States like Montana, we should think again.

What this highlights is the puzzling and utterly frustrating fixation the Corps has on supporting a minor navigation industry in the lower Missouri at the expense of every other use of the river. Mr. Woodley, I know you are in the audience there, and I know you know there is a sense in the Corps that, well, we've put this behind us, that the new master manual is set, that we should just all pray for rain.

Well, I hold a hope, a very strong hope, that some day we're going to get more than that. As you know, I introduced a bill last Congress that would set the navigation to preclude at not 31 mil-

lion acre feet, but at 44 million acre feet. My view is a much more reasonable number, and one that until this drought is finally over with has rarely been breached. The Senate Interior Appropriations bill last year called for changes that precluded at 44 million acre feet. When the Corps studied the impacts this would have on the Missouri River, it found there would be a net positive impact along the Missouri River.

Sometimes I feel I am beating a dead horse. But we are just devastated at Fort Peck. I really would like the active assistance of the Corps in finding more and better ways to address the impacts of continued drought at Fort Peck. We need the Corps' help, not the Corps' sympathy.

Mr. Woodley, I know you're out there somewhere. This time I need a genuine commitment from you to work with me and the Upper Basin States to find a better way. I cannot stress this enough. I am not going to give up. I am not going to give up. We are going to find a way to make sure that those folks in the Upper Missouri River get fair treatment. They have not been receiving fair treatment. I thank you, Mr. Chairman, for letting me make that statement.

Senator INHOFE. Thank you, Senator Baucus.

Senator Voinovich.

**OPENING STATEMENT OF HON. GEORGE V. VOINOVICH,  
U.S. SENATOR FROM THE STATE OF OHIO**

Senator VOINOVICH. Mr. Chairman, perhaps President Bush has found a way around the challenge of having an EPA director that doesn't do enough for the environment or too much for business by nominating Mr. Johnson to be our next EPA Administrator. He has two very unique qualities. First, in this unheard of politically divisive world we operate in, he will be the first career official to hold a position, having worked at the EPA for 24 years. I'm sure that's applauded by people that are working in the Agency, it's going to be good for the esprit de corps.

He also has extensive knowledge of the inner workings and the personnel at the Agency. The members of this committee ought to know that the EPA is in deep, deep trouble today in terms of the number of people that they need to get the job done. We need to get somebody on board very, very quickly, so that we don't hemorrhage any more.

Second, we have a professional scientist to be the Administrator. This is an area where I've been concerned about for a long, long time, Senator Carper and I have had legislation in the last couple of years because we think we need more science at the EPA. I rejoice in the fact that you are a scientist. So that's the good news.

[The prepared statement of Senator Voinovich follows:]

STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE  
STATE OF OHIO

Mr. Chairman, thank you for holding this nominations hearing.

This morning, I am going to put on two hats that I wear proudly in the Senate. The first is as a member of this committee and the second is as Chairman of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.

As I am sure my colleagues know, I am very interested in the management of our federal government and its workforce. Finding the right people with the right

skills to run our nation's agencies, departments, commissions, and foundations is very important.

The nominees before us today have extensive experience in both the private and public sectors. I thank you all for your willingness to serve, and even more importantly, I thank your families for their sacrifices. I welcome you and look forward to hearing from you.

Our first nominee this morning is Steve Johnson to be EPA Administrator. In my opinion, this is one of the most difficult positions in the federal government especially in a Republican Administration. No matter what you do it is either too far for industry or not enough for the environmental groups.

However, I wonder if President Bush has found a way around this challenge by nominating you to be our Nation's next EPA Administrator. You have two very unique qualities. First and this is unheard of in this politically divisive world we operate in you will be the first career official to hold the position as you have worked at EPA for 24 years. Your extensive knowledge of the inner workings and personnel at the Agency may be exactly what is needed to manage it.

Second, you will be the first professional scientist to be Administrator. This is an area that I have long been concerned about at EPA. In fact, I have introduced legislation over the last two Congresses with Senator Carper to strengthen science at the Agency. I look forward to working with you because EPA must have a fundamental understanding of the science behind the real and potential threats to the environment to be effective.

I also look forward to working with you on a variety of other issues, including:

More funding and assistance to local communities to deal with water infrastructure needs;

Strong leadership in the President's comprehensive effort to restore the Great Lakes; and

Harmonizing our environment, economic, and energy needs through clean air regulations.

Again, I thank all of the witnesses for being here today and for their desire to serve this country.

Senator VOINOVICH. I'd like to switch and ask a question. That question is, or is it appropriate, are we in the question period?

Senator INHOFE. It's appropriate, yes.

Senator VOINOVICH. The recent mercury rule that was released, several States and environmental groups have sued, which we all expected. I fully expect lawsuits on the Clean Air Interstate Rule in the near future from a lot of groups.

Based on past lawsuits on rules of this nature, and I'd like you to use an example if you can, how much will these lawsuits cost the Government to defend, and how long will the rules be delayed because of these lawsuits? I just wanted you to know, my opinion is today we have an environmental policy called litigation policy. That's what we have had for the last 40 years. Can you answer that question?

Mr. JOHNSON. I'd be happy to, Senator. There's a wide range of experiences, I can't comment on the costs. But what I can comment on and give you some examples, at least one example that comes to mind, as you know, I spent many years in the Office of Pesticide Programs regulating pesticides. A number of years ago, EPA moved to suspend a hazardous pesticide, the chemical name was 245T Silvex. From the time the Agency moved to suspend this dangerous chemical, I believe the length of time before cancellation finally went into effect was 10 years, 10 years of litigation and back and forth.

That's obviously not a cost effective way to try and manage the environment.

Senator VOINOVICH. How long do you think the litigation—

Senator INHOFE. Senator Voinovich, we are going to have two rounds of questions. Were you not going to be able to be here later? If you were, I'd like to hold off questions.

Senator VOINOVICH. OK, thank you.

Senator INHOFE. Thank you, Senator Voinovich.

Senator Carper.

**OPENING STATEMENT OF HON. THOMAS R. CARPER,  
U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator CARPER. Thanks, Mr. Chairman. I would say to Steve Johnson, welcome this morning. I suspect when you testify you will have an opportunity to introduce some of these people, maybe family or friends behind you. If any of them might be parents or spouses, I just want to say—

Senator INHOFE. We are going to ask him to introduce his family.

Senator CARPER [continuing]. I just want to say to each of you, thank you for sharing, well, first of all to the parents, thank you for instilling in this man the understanding that we have a responsibility to serve this country. To anybody who is sitting in the audience who might be a spouse, thank you for sharing him with all of us.

As you know, Clear Skies failed to be reported out of this Committee last month, a 9–9 vote, because folks on my side and Senator Chafee on the other side thought that we could do better than the Administration's Clear Skies proposal. I want to be clear, just because we voted against that bill that day doesn't mean that we don't want a bill. I very much want a bipartisan bill. I believe it's possible to get one.

In order to enact a strong, balanced piece of legislation this year, we need more cooperation from the Administration. On March 3d, I sent a letter to you, Mr. Johnson, asking EPA to conduct a detailed cost-benefit analysis of the various multi-pollutant Clean Air bills that Congress has proposed, namely that proposed by Senator Inhofe, I believe, on behalf of the Administration, Senator Jeffords' proposal and a proposal I had introduced in the last Congress with Senator Chafee, Senator Alexander, Senator Gregg and myself.

As of today, not only have I not received these analyses, I have not been given assurances from you that we will receive them in the future, if we will ever receive them in the future. I know that some on this panel and the Administration have said that our committee has all the information that we need. I just disagree. EPA has conducted extensive analyses of Clear Skies. The same cannot be said of our bill or the Jeffords bill.

In order for Democrats to sit down with Republicans and negotiate a compromise to these decisions on what the appropriate caps and time lines should be for NOx, for SOx, for mercury, for carbon, we need this information from EPA. Senator Voinovich mentioned earlier our interest in good science and making sure, the idea that you are a scientist is something that we welcome. But we need good, scientific analysis from the EPA.

I don't think it matters who is in the White House, what party is in the White House, who is in majority in the Congress. When we are asked to make these difficult decisions, it's just an enormous help if we can get good, timely, comprehensive analysis.

March 3d was not the first time I have requested this information. Let me just give this short history. In 2003, EPA delivered to me a partial economic analysis of the Clean Air legislation that a number of us had introduced in 2002, with one major caveat. The EPA said that they had changed to modern techniques, and that using the latest assumptions, the cost and health benefits of our bill “differ in some cases significantly” from the information I was given.

Not surprisingly, I then asked EPA to conduct a new analysis, using the most up to date techniques possible. In June 2004, I received another letter from EPA saying that because the Environment and Public Works Committee was not preparing to move Clear Skies that year, that EPA would not conduct the analysis that we had sought.

The irony is that when we started toward markup early this year, I again repeated my request for a detailed technical analysis of the Jeffords bill and our bill. Then I was told that EPA didn’t have time to do it, because the committee was moving quickly to pass legislation. That response, my friend, is just unacceptable.

In hindsight, some might say that it was even a foolish position to take, especially in light of the fact that it is now April and we have yet to move a bill out of this committee. If EPA had conducted the analysis that we first requested, it would be in our hands, would have been in our hands for some time and in the hands of each of our colleagues. We would probably be a lot closer to getting a bipartisan bill to the President’s desk.

Mr. Johnson, let me just be perfectly clear. I want the same modeling done for the Jeffords bill and for our bipartisan bill that the EPA has done for the Clear Skies legislation. This is not an unfair request. My colleagues have asked me to negotiate a compromise on this bill if possible. I know that my friend, Senator Voinovich, is frustrated, has been frustrated with me and our process, because I have not been able to put down a counter-offer to what he and Senator Inhofe have proposed.

I’m just not sure how I’m supposed to counter if I don’t know what I’m trading. I don’t even know the benefits my own bill brings to my own State. I know what Clear Skies will do and frankly, it’s not much for Delaware. Clear Skies won’t solve Delaware’s air quality problems, and the Administration’s I think woefully inadequate mercury proposal means more Delawareans will get sick from mercury related illnesses.

After the Clear Skies bill died a couple of weeks ago, I said that no means find another way. We need EPA’s help and cooperation if we are going to find another way, and we need the information we have requested to find another way and to help us craft a bipartisan bill that can pass this committee, and more importantly, be signed into law this year. If the Administration is serious about getting clean air legislation done this year, and I hope that it is, then I suggest that EPA deliver the information that we have requested, and let’s go to work.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Carper.

Senator Chafee.

**OPENING STATEMENT OF HON. LINCOLN CHAFEE,  
U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator CHAFEE. Thank you, Mr. Chairman, very much. I am pleased to be here today and look forward to hearing the testimony of Mr. Johnson as Administrator of the Environmental Protection Agency.

I believe the nomination of a scientist who has made a career at EPA is an important characteristic in selecting a candidate as Administrator. I appreciate the time that Mr. Johnson has spent in my office reviewing his credentials, and I look forward to working with him in the future.

Senator INHOFE. Thank you, Senator Chafee.  
Senator Lieberman.

**OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN,  
U.S. SENATOR FROM THE STATE OF CONNECTICUT**

Senator LIEBERMAN. Thanks, Mr. Chairman. I thank you and welcome you, Mr. Johnson, welcome your family. I just take a look at your dad, and there's a remarkable similarity between the two of you. There's not going to be any paternity actions in this matter, it's very clear on your face.

[Laughter.]

Mr. Johnson. Senator, you have made his day.

[Laughter.]

Senator LIEBERMAN. Needless to say, you are both very good looking guys.

Mr. Johnson, I want to thank you for your 24 years of dedicated public service. I must say, as others have said here already, that I'm encouraged that at a time when there are so many challenging and indeed controversial environmental decisions and problems facing us that the President has nominated a respected scientist and career employee to be the next Administrator of EPA. This is genuinely refreshing and encouraging.

I commend you for stating in your prepared testimony how important it is for the Agency to base its decisions on the best available scientific information and on developing rules through "an open and transparent decisionmaking process." As you know, there is a lot of concern here in Congress and outside about occasions on which people feel that science has taken a back seat in recent years in some of the decisions that EPA has made.

In February of last year, which you probably remember, a group of over 60 prominent scientists, including 20 Nobel laureates, sent an open letter to the President alleging that too much of the science-based decisionmaking had been politicized. That can't be permitted, and I know from having talked to you that that's not what you intend to do as Administrator. You are a scientist and you will make the best judgments you can based on science.

This gives me encouragement, if I may take this occasion to do so, to say that I hope you will apply or find a way to apply this principle retroactively to recent agency, one recent agency decision regarding the clean air mercury rule, which was signed on March 15th. Personally I am not convinced that the principles of good science were consistently applied in this rulemaking process, and those concerns have been expressed also by the GAO and the In-

spector General of EPA itself certainly with regard to process in the recent reports.

I hope that as you begin your duties you will reexamine the science informing this particular decision and specifically take a look, if you have not already, at the study from Harvard University that the EPA funded, yet it appears to me did not follow, perhaps even ignored in the development of its rule. If you find that the science supports a much lower cap on mercury emissions in this country, I hope you will take action to revise the ruling. As you know, many of us here in Congress are convinced that lower emissions limits of mercury are limited to adequately protect human health and the environment and that the technology exists to achieve them much sooner than 2018, which is the current proposal.

In confirming your nomination, this committee and the Senate will be telling the Nation that we have given you our trust, our trust that you will make the best decisions based on the best science for the health of our environment and of course, for the health of our citizens. That is an enormous responsibility, but I have confidence, based on your record and my more recent conversations with you that you will take on this responsibility with the integrity and dedication that you have demonstrated throughout your career at EPA.

I look forward to supporting you, and I am confident you will help America meet the environmental challenges ahead. Thank you very much.

Senator INHOFE. Thank you, Senator Lieberman.

[The prepared statement of Senator Lieberman follows:]

STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE  
STATE OF CONNECTICUT

Thank you, Mr. Johnson, for your 24 years of dedicated service to an important agency. I find it encouraging that in a time where so many challenging and controversial environmental issues confront us, the President has nominated a respected scientist and career employee to be the next Administrator.

Mr. Johnson, I commend you for stating in your testimony the importance of basing agency decisions on the best available scientific information, and on developing rules through an "open and transparent decision-making process." I trust that as a scientist, you appreciate the importance of those words. The American public needs to know that the decisions the Agency makes are based, above all, on good science.

Unfortunately, several members of this committee share my concern that in recent years, science has taken a back seat in the decision-making process at EPA. We are not the only ones who hold this view. As you know, in February of last year a group of over 60 prominent scientists, including 20 Nobel laureates sent an open letter to President Bush criticizing the recent politicization of science-based decision-making.

While there are many considerations that affect decisions, in recent years, science has not only been neglected or ignored, but even worse, has been selectively applied to support pre-determined conclusions. I fully expect you to uphold the ideals that you state in your testimony; in my interactions with you thus far, you have given me hope that you will do so.

Your emphasis on science further gives me confidence that you will apply this principle retroactively to recent agency decisions where the scientific basis has been questioned. Specifically, I would like you to re-examine the Clean Air Mercury Rule. I am not convinced that the principles of good science were consistently applied in the development of this rule, concerns that were repeated by the GAO and EPA Inspector General in their recent reports.

I trust that once you begin your duties as Administrator, you will make it your highest priority to re-examine the science informing this decision, and specifically

examine the Harvard study that the EPA funded yet ignored in development of its rule. If you find, as I expect you will, that the science supports a much lower caps on mercury emissions in this country, I expect you to revise your ruling. I and many of my colleagues are convinced that lower emissions limits are needed to adequately protect human health and the environment, and that the technology exists to achieve them much sooner than 2018.

In confirming your nomination, we will be telling this nation that we have given your our trust - trust that you will set aside partisan political considerations and make the best decisions, based on the best science, for the health of our environment, and for the health of our citizens. This is a tremendous responsibility. I have confidence that as a scientist, you will approach this position with the integrity and dedication you have demonstrated throughout your career at EPA, and I wish you well in meeting this challenge.

Senator INHOFE. Mr. Johnson, I am going to go ahead and recognize you for a very brief opening statement. I want you to introduce what members of your family are here today. But after that, we are going to go to two rounds of 4-minute rounds of questioning. We are going to try our best to dispose of this panel by 20 after. For the benefit of my colleagues, there is going to be a vote at 10 o'clock. However, we have told them that we will continue to meet in here until 10:20, so no one is going to miss his or her vote by doing so.

Mr. Johnson.

**STATEMENT OF STEPHEN JOHNSON, NOMINATED BY THE  
PRESIDENT TO BE ADMINISTRATOR, U.S. ENVIRONMENTAL  
PROTECTION AGENCY**

Mr. JOHNSON. Thank you, Mr. Chairman. Distinguished members of the committee, I am honored to appear before you today as the President's nominee for the position of Administrator of the U.S. Environmental Protection Agency.

I want to thank Chairman Inhofe and also Ranking Member Jeffords for scheduling this hearing this morning. I also want to thank many of you for the courtesy meetings with me in the past several weeks and for allowing me to discuss my qualifications for this position.

If it pleases the committee, I would like to ask that my full written statement be included in the record.

Senator INHOFE. Without objection, so ordered.

Mr. JOHNSON. Thank you, sir.

If I may, I would like to take a moment to introduce the members of my family who have accompanied me this morning. I am pleased to have my wife, Debbie, and my son, Matthew here with me today. I regret that my daughters, Terri and Allison, are not able to be here. They are taking care of our two new grandchildren this morning. We thought it was better for them to be there than here.

I am also pleased to have my father, Bill, who is 82 years old and can still work me into the ground every day. Senator Lieberman, you have now found favor with my father.

[Laughter.]

Mr. JOHNSON. I am also pleased to have my wife's parents, John and June Jones, attending as well.

I would like to say one further word about my dad. He retired after spending over 30 years of service to the U.S. Government. As



you can tell, I'm really proud of his service. I'm especially proud that he could be here today with me.

I would also like to introduce three close friends with me today, Ms. Ona Chapman, a long-time family friend from Boone, NC; the Rev. R. Dallas Greene, who is the pastor of my church in Frederick, MD; and George and Linda Selden of Campus Crusade, also dear friends.

Mr. Chairman, I would like to begin by saying that I am enormously indebted to President Bush for the opportunity he has given me. I have had the privilege of serving in EPA for more than 24 years. I was trained as a scientist, with a graduate degree in pathology. I served in a number of positions and capacities within the Agency. I was honored to be chosen by President Bush in 2001 to serve as Assistant Administrator for the Office of Prevention, Pesticides and Toxic Substances.

Again, I was honored in 2004 to be selected by the President to serve as Deputy Administrator. But it is an unparalleled privilege to be selected to lead the Environmental Protection Agency. As the first career employee and trained scientist to be nominated, I am most grateful for the opportunity.

It is a fair question to ask how I would lead the Agency if given the opportunity. During my more than two decades at the Agency, I have worked with eight of the nine EPA administrators, and I understand that we build on the accomplishments of those who have preceded us. As former Administrator, now Secretary Leavitt described it, we are running a generational relay race, passing the baton from one generation to the next, vowing to keep up the pace of environmental protection and striving to accelerate the pace.

Mr. Chairman, as I consider the next leg of the race to be run, I see that we have made extraordinary progress in environmental protection over the past 30 years. I am proud to say that we have done so while maintaining an economy that continues to grow. We have developed an ethic of environmental protection in the United States. The questions now are, how can we do this better, with more certainty, using better tools.

I see two key challenges before the EPA, if are to maintain the pace of environmental protection in a vibrant economy. First, we must manage the dynamic evolution of scientific discovery. Second, we must identify and formalize collaborative approaches to solving environmental problems.

Let me say a word first about managing science in the EPA. As a scientist, I am intrigued with the promise of new areas that technology and scientific discovery hold for improving the world we live in. But I also recognize the process of scientific discovery is not always straightforward. There are times when we are not sure what the science is telling us.

So our challenge is to make sure that when we are required to make regulatory or policy decisions, we are using the best available scientific information while continuing to pursue and encourage rigorous scientific inquiry.

I would like to say a word here about the recent clear air mercury rule, because I think it is an example of the kind of challenge presented by the dynamic nature of scientific inquiry. The issue of mercury emissions from coal-fired power plants had languished in

the Agency for too long. It was time to make decisions about how to control these emissions from power plants.

But few of the scientific questions are easy. We face questions of how quickly technology would develop, how the fate of various types of mercury in the environment would occur, and what about the sources of exposure to the human population? Using our best scientific judgment, we carefully reviewed many scientific studies and more than 500,000 public comments in reaching our decisions in the rule.

I am proud to say that this is the first regulation anywhere in the world to control mercury emissions from power plants. But we are not finished with the issue of mercury. We will continue to follow the science to better understand the risks to human health and the environment. We will do our best, in an open and transparent way, to make decisions based upon the best available science to continue to protect public health and the environment.

The second challenge we face is to identify and formalize collaborative approaches to solving environmental problems. The traditional methods of environmental protection are not as effective in the face of new realities. We have harder scientific questions to answer, sometimes fewer resources, and many times our environmental issues extend beyond the reach of our agencies and even our court systems. We need to find new ways to identify common interests and solve pollution problems.

The President's Executive Order on the Great Lakes is one of the best, most recent examples of a successful collaboration. We need to recognize when environmental problems are amenable to collaborative approaches and learn the skills necessary to lead such collaborations to successful completion.

Mr. Chairman, looking into the future, an essential ingredient for meeting these two challenges for the next leg of our generational race is a well trained, professional staff at EPA. We need people who are trained in the sciences, who are committed to an open and transparent process, and who are passionate about finding new and innovative ways of solving problems. As a veteran of the Agency, I would make it a priority to develop these qualities in the next generation of EPA professionals.

Mr. Chairman, in conclusion, I have dedicated my entire professional life to protecting public health and the environment. I have always believed that these goals are consistent with maintaining our economic competitiveness. I am proud that our Nation has prospered as we continue to achieve our environmental objectives.

If confirmed, I will do everything I can as Administrator to continue to serve the American people by working to protect their health and the health of the environment. Thank you very much. At this time, I would be very happy to answer any questions you may have.

Senator INHOFE. Thank you, Mr. Johnson. As Chairman, I have no questions. We are going to still try to get this done in time. I would recognize Senator Jeffords. These will be 4-minute rounds.

Senator JEFFORDS. For the convenience of Senator Carper, I would like to yield my time now for him, and I will hold my questions until the second round.

Senator INHOFE. Senator Carper.

Senator CARPER. Thanks very much. Thank you, Senator Jeffords.

Mr. Johnson, as I stated in my opening statement, on March 3d of this year, I sent to you a request for analysis of various multi-pollutant legislative proposals. I just want to ask first of all, what progress have you made in fulfilling that request?

Mr. JOHNSON. Well, Senator, thank you very much for the request. Thank you for your interest in helping us move the Clear Skies legislation. I believe that is an important piece of legislation that we should continue to pursue. I think it's the right answer. It's a better answer than the two rules that we have put in place.

I am convinced and continue to believe that the best approach is working with you and other Members of the committee in a bipartisan fashion to get whatever analyses that you all need to be able to move this important piece of legislation forward. So my commitment to you, Senator, is to work with you in a bipartisan fashion to get the analysis that we all agree is necessary to move this forward and to have the debate.

Senator CARPER. Again I would ask, what progress has been made in fulfilling that request? It was rather specific, and you and I had an agreement to go over that.

Mr. JOHNSON. Senator, we have not begun the specific analysis. The first reason is, as I believe I mentioned to you when we met, is that when your initial letter came in on March 3, we were in the midst of doing very detailed analysis, long into the night of many nights, of finishing up our mercury rule. We had a court deadline of March 15. So our attention was, I believe, appropriately focused on making sure we were meeting that deadline.

Second, since that time, as I met with you and Senator Voinovich and Senator Inhofe and Senator Jeffords, it became very clear to me that there was bipartisan interest in moving forward, but that there was no agreement as to what analysis needed to be done. I respect your request. You certainly have my commitment to work with you, Senator Jeffords, the Chairman, and Senator Voinovich in a bipartisan way, to provide whatever analyses that this committee needs to be able to answer the questions.

Senator CARPER. Let me just ask you, whose permission do you need to respond fully to the request I've made of you?

Mr. JOHNSON. I'm not sure that there is permission per se. I would say and reiterate that I believe it's appropriate for us to work together in a bipartisan way to try to address this.

If there is no interest in moving the legislation forward on both sides of the aisle, then I would say that I'm not sure that's the wisest use of resources. But again, I wouldn't want to preclude that. I would want to have further discussions. So my commitment, again, is to work with you, Senator Voinovich, the Chairman, and Senator Jeffords to meet your needs for the data that you need, to be able to help move this important piece of legislation. Because I agree with you, I think Clear Skies is a better approach.

Senator CARPER. I would not pretend to speak for my friends on the other side. But there is plenty of interest on this side in moving a strong, balanced bill. It protects our environment, protects public health, and it is fair and reasonable to those of us who consume electricity and those who would produce it.

Let me just ask directly, do you intend to conduct the analysis that I have requested?

Mr. JOHNSON. I will conduct the analysis that has been requested by this committee, yourself included, if there is agreement on what analysis needs to be done. Again, if it's clear that the committee is interested in conducting analysis and moving Clear Skies forward, which I certainly hope it is, and that is my belief, then I am prepared to have the Agency conduct whatever analysis is necessary.

Senator CARPER. To your knowledge—

Senator INHOFE. Senator Carper, I'm very, very sorry, but in deference to the other members of the committee, we ought to try to keep within our 4 minutes. You will have another opportunity.

Senator CARPER. Thank you very much.

Senator INHOFE. Thank you. Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman.

Welcome again, Mr. Johnson. I have two quick questions.

I have a personal belief that we here spend too much time arguing about standards that oftentimes by their best are arbitrary and far too little time talking about best management practices and motivation for solutions.

To that end, my first question is this. A couple of years ago, in the southern Tennessee Valley, northwest Georgia, a number of counties in those States came together and created an early action compact to address particulate matter and to try and prevent, and meet attainment so they would not fall into non-attainment. This PAC was an aggressive PAC where these counties and communities made aggressive efforts to reduce the particulate matter.

It's my understanding that notwithstanding what they did in that compact that they are going to be found to be non-attainment. Why would we have an encouragement for people to go into compacts to address the problem we're concerned about, and then even when they do it, have no transition or no ability to give them some room and then find them in non-attainment?

Mr. JOHNSON. Well, Senator, certainly we are and should, and I certainly encourage the development of and signing up for early action compacts. That is the kind of collaborative approach that I think is the right thing to do.

Having said that, we do have the requirements of the Clean Air Act that we all have to fulfill. When monitors that meet the requirements of the statute find that there are exceedances, whether it be fine particulate such as  $PM_{2.5}$  or ozone, then we are bound by what the law directs us to do, and then we have to find that those cities or areas are in non-attainment.

Having said that, certainly we need to work even harder to work with the State and local communities to address those issues. Clearly, regulations that are put in place such as the Clean Air Interstate Rule help, the Clean Diesel Rule, certainly helps to address a lot of the issues that we're talking about. But you certainly have my commitment to continue to work with you and the communities in your jurisdiction to help them in any way that we can to make sure that the air is clean and also meeting the standards.

Senator ISAKSON. Would I be correct in assuming that were Clear Skies the law, in such a situation where you had early action com-

pacts, you in fact would have an opportunity to determine this as a transition area rather than a non-attainment area and actually encourage collaboration?

Mr. JOHNSON. That is correct. That is part of one of the provisions that certainly has been discussed as part of the Clear Skies and one of the many advantages to the Clear Skies legislation.

Senator ISAKSON. I have to cut you off, but I have one other quick question. The two great motivators in life, one is fear, the other is reward. There are others, but those are the most significant.

In the 1990's, I worked in Georgia, in the Soil Sediment Control standards in the State of Georgia. It's my understanding that EPA has taken a most aggressive posture on violations of the Stormwater and Soil Sediment Erosion Control standards, to the extent that there is no leeway between notice of an offense and right to cure. The fines are significant. I understand fines are a motivating reward.

But given the type of weather than can happen and acts of nature, doesn't it seem appropriate that if we took a best management practice approach, which is to notify a violator, give them a chance to remediate on a first offense, not talking about a repeat offender, that would be a far better solution than to arbitrarily be sticking rather significant fines on people with no right or time to cure?

Mr. JOHNSON. As a general course, I believe that the direction that we need to be headed is to ensure that there is compliance. The reason why there are stormwater runoff rules is to ensure the protection of the environment. There are multiple ways to get there, as you've said.

I believe our approach with that issue is to work with the communities and the facilities to first understand what the problem is and then address it.

Senator ISAKSON. Thank you.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Isakson.

I regret to say that the very ambitious schedule that I outlined an hour ago isn't going to work. We are going to recognize Senator Boxer, she made a request early on to forego her opening statement and have her 4-minute rounds consecutive. We will acknowledge you at this time.

But I would say to the rest of you, after she has completed, we will go ahead and vote and go to our joint session, then reconvene at 2:30. Does anyone have a problem with that?

Senator Boxer, for 8 minutes.

Senator BOXER. Thank you, Mr. Chairman.

Congratulations on your nomination, Mr. Johnson. You and I had a good talk about the fact that this committee, individuals on it, we need more information. I am going to take you at your word that you will do that, so I'm not going to belabor the point.

But I think I'm a little troubled by some of your answers to Tom Carper. But hopefully, you will surprise us and we will be happy and get the information we need to make sound judgments.

I am very concerned about a number of issues, some of them have been mentioned here. But I am going to focus in on pesticide

testing on humans. Mr. Johnson, you've spent most of your long career working on pesticide programs. In 2001, you were promoted by the Bush administration to head the pesticide program. When you were first elevated to this position, the Bush administration overturned the Clinton administration's informal moratorium on human testing of pesticides, so that human testing could continue.

Administrator Whitman quickly reversed that decision after a public outcry. At the time, you were quoted in the L.A Times as saying, "We believe we have more than a sufficient data base through the use of animal studies to make licensing decisions that meet the standard to protect the health of the public without using human studies." Now, we know what the court said, was that the EPA had to do more, make more of a case before you could ban human testing, and that is in process.

But despite your statement that you didn't need human testing, in October 2003, while you were running the pesticides program, EPA proposed the Children's Environmental Exposure Research Study, or CHEERS. I have a copy of the brochure that I have blown up on a chart, Mr. Chairman. This picture really tells it all. The picture tells the story.

The study is recruiting very young babies, less than 3 months old as a target group, and their families, and providing incentives for routine pesticide spraying in their homes. If you agree to keep up the spraying over a 2-year period, you can get up to \$970. You also get a framed certificate of appreciation, a CHEERS bib, a tee-shirt with the child riding a bicycle and the CHEERS logo, a calendar, a newsletter and the video camera you use to tape the effects of pesticides used on your baby. You get to keep the video camera.

Mr. Johnson, in my opinion, this is just me speaking, I don't speak for anyone else. As someone who wrote the Children's Environmental Protection Act, I find this an appalling project. I think it's unethical, because we already know that children are very sensitive to chemicals, much more than we are. It flies in the face, I think, of everything that we know about pesticides and kids.

The financial incentives are also likely to attract lower income residents of the Florida county that is the target of the study. If ever there was a case of environmental injustice with the victims being babies, this is it.

Now, I had, I was led to believe by little articles in the newspaper that this program had been canceled. But I was confused as to why this recruiting brochure is still up on your web site. I called the phone number, and I could take the time to play it, but I can just show you the chart, I have it. This is what you get when you call the number. "Thanks for calling CHEERS. The study has been delayed due to some technical issues. We don't know how long the delay will last, but we will contact you in the future when we resume the project. Thanks again for your interest in CHEERS."

So my question to you is, has this program been canceled?

Mr. JOHNSON. Senator, I suspended the program. Our Office of Research and Development that developed the research protocol went through four institutional review boards for the protocol. The intent to go into people's homes and to monitor what their normal activity was with children there was the intent.

But seeing and hearing about the various issues which you have just raised, I actually suspended——

Senator BOXER. Has the program been canceled?

Mr. JOHNSON. I have not canceled the program, and I suspended it. Here's what I have asked be done. In fact, in the coming weeks, there will be a public hearing that this study will be presented to a joint panel of experts, experts outside the Agency that include experts from our children's health advisory——

Senator BOXER. I'm sorry to cut you off, but has the program been canceled?

Mr. JOHNSON. It has been suspended.

Senator BOXER. The answer is no, is it not?

Mr. JOHNSON. That's correct. It has been suspended, pending the outcome of external scientific peer review.

Senator BOXER. We will contact you in the future when we resume the project. Now, your description of what you had intended is not what it says in this brochure. It says, am I eligible to participate? Sixty participants, only 60, will be selected. To be selected, you must live in Duvall County, FL, which by the way is 27 percent minority population, be a parent of a child less than 3 months old or between the ages of 9 to 12 months old and spray or have pesticides sprayed inside your home routinely.

You have not canceled this program. Now, my understanding is that you have a group that is now studying this program. Why are you studying this program? Don't we know enough to know that this would be morally wrong, to entice probably low income people, to entice them with \$900 plus, it's a lot of money for some people, keep spraying their children, essentially, the environment of their children for 2 years, otherwise they don't get the money?

Isn't that just wrong on its face? Why do you have to study that? You said we don't need human testing. You used that clear statement in 2001.

Mr. JOHNSON. I stand by the statement. We don't need——

Senator BOXER. Good. So then, why don't you cancel the program?

Mr. JOHNSON. Well, the reason why we didn't cancel the program was because the issues that you raised are issues that come up with every study, whether it's children or adults, where human subjects are involved. Again, the researchers were trying to identify a sub-population that were using pesticides, not encouraging them to use, certainly not directing them to expose children to pesticides or other chemicals, because it was more than——

Senator BOXER. Mr. Johnson, if I were to go out and say, I want to find out more information about smoking and what it does to women, because we know now women seem to be more adversely impacted. I said, for 2 years, if you smoke, you continue, you're already smoking, you're smoking a pack a day, we're not asking you to smoke more, but you continue smoking a pack a day for 2 years, we'll give you \$1,000. That's wrong.

Why are we going into these homes where they may be pesticide spraying, maybe the parents don't even know the information you and I know, and just telling them, use those pesticides as infrequently as possible and try to get people to understand that it's bad?

All I'm saying is, and I'll conclude here, because I heard the cough of my Chairman——

[Laughter.]

Senator BOXER [continuing]. Kind of a hint, I've gotten to know his cough.

I feel so strongly about this, Mr. Johnson, that unless this project is canceled, I have a lot of problems moving this nomination forward, I'm going to be honest. I don't think we need any more studies to know this is morally wrong. Take little babies and entice their parents with gifts? What do these kids know about it? They are innocent victims, and I think it's outrageous and I think you ought to pull the plug on that program tomorrow. If you don't, I'm going to have problems. I'm going to use everything at my disposal to make that happen.

I thank you.

Senator INHOFE. Thank you, Senator Boxer. We are recessed until 2:30 this afternoon.

[Whereupon, at 10:20 a.m., the committee was recessed, to reconvene at 2:30 the same day.]

Senator INHOFE. All right, the meeting is reconvened. We are out of recess. There is a vote that will take place in about 10 minutes, but we plan to work all the way through the votes and ask the committee if they will take turns in going out to vote and coming back.

We will continue now with Mr. Johnson and Senator DeMint. I don't believe you have had a first turn at questions, have you?

Senator DEMINT. No, I have not.

Senator INHOFE. OK, well, you're recognized for either both of yours or one of yours.

Senator DEMINT. OK, great. Thank you, Mr. Chairman.

Thank you, Mr. Johnson, for being here today. I had a chance to meet your dad, who you told me about as well, who is from Myrtle Beach, SC. We have some family connections here in the State. I met with Mr. Johnson on several occasions to talk about some issues in our State that are very important to us. I appreciate your responsiveness. As you know, it's very difficult when areas are in non-attainment to replace jobs, which in South Carolina, because of the loss of textile jobs, we have the third highest unemployment rate in the Nation. Trying to attract new industry is difficult when you have non-attainment status.

You have assured us that you will work with us on making sure the monitoring is fair, which I greatly appreciate. But on a larger scale, I would just like to mention, you brought up just the ethic of protecting the environment in the EPA, which I greatly appreciate. But I hope with your leadership that we can expand that ethic to include a culture of recognizing that not only do you need good air, clean water to have a good quality of life, but you need a real good economic environment.

I think in the past the EPA has been known for more of a punitive relationship with the business community, when in fact we need what you mentioned before, a more collaborative relationship. Business needs partners on how to produce. There are so many incentives now for someone to outsource something, because we can't get an environmental permit to do something, when in fact with



the right science, the right collaboration, we could do those jobs here in this country. In talking with you, I feel like that you'll bring that rational perspective to the EPA, which I greatly appreciate.

But as you know, in our area we have asked for particular help with a particular monitor, and at this point feel like the EPA has not even filed its own criteria with the locations of those, which has put many jobs at risk. So I would appreciate the follow-up that you have promised us, and I fully, am very convinced that you will what you said, which I greatly appreciate.

Mr. JOHNSON. Thank you.

Senator DEMINT. But if I have just a minute, I would just like to get maybe your thoughts on the collaborative relationship with business, economic growth and how you see bringing a culture that has been focused on standards for the environment to standards that balance the economic needs as well as bringing all of your science and methodologies to bear on partnering with industry so that we can produce in this Country and still have clean air and clean water.

Mr. JOHNSON. Thank you, Senator. Let me first comment that I do certainly commit to work with you to address the air issue and the monitor which may be problematic, and look forward to working with you each step of the way. I think we have outlined a good series of steps to take to better understand that, with additional monitors and other things. I look forward to working with you and you certainly have my commitment.

With regard to environment and economics, my experience and certainly my belief is they not only go hand in hand, they really must go hand in hand. Because without a vibrant economy, certainly my experience is, less attention is paid to the environment. I believe that they need to go hand in hand, and that we need to pay attention to the environment as we move forward in our economic development.

Certainly I think we have some absolutely outstanding examples of things that we have done cooperatively. One of my favorite examples in the air program is one of the labels that we have called EnergyStar, and EnergyStar is currently used on multiple appliances if they meet a certain standard.

What's interesting to me is in the year 2004 that just by the purchasing and use of these EnergyStar certified products, if you will, that just that one, just the year 2004, the savings both in electricity, I believe the number is about \$10 billion in savings of energy costs, and also the amount of emissions reduced by buying an EnergyStar product equates to, I believe the number is about 20 million cars on the road. So here is just a label, and informing consumers of what kind of product to buy, one that is energy efficient, has tremendous, tremendous leverage and opportunity. That is an example of the kind of collaborative partnership that is working, continues to work, and that's the kind of thing that I'd like to see expand to other areas.

Senator DEMINT. Thank you very much.

Mr. Chairman, if I could make one comment about our next nominee, because I'm not sure if I'll get back. Another challenge we have in our State, I think it takes about twice as long in our State

to get a permit from the Army Corps than several other States, which is another jobs issue. But on at least one occasion I have requested help from Secretary Woodley, who has come to our State and solved our problems at least on specific matters. I want to thank him publicly for being responsive, and I hope he can bring that culture to the whole office there in South Carolina.

So thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator. Senator Boxer, 3 minutes.

Senator BOXER. Yes, I will go fast here. Thank you, Mr. Chairman.

Mr. Johnson, just to continue on this issue that I raised with you, the Children's Environmental Exposure Research Study, where EPA has a plan about which was put on hold and not canceled, and continuing to evaluate that would expose babies to pesticides, what do you tell in the application? Are you aware of what you're telling families about the possible risks to their children?

Mr. JOHNSON. Senator, some times there is an opportunity to take advantage of a break and a recess. After you raised the issue on the children's study, I went back and looked at both the voice mail message and also what was on our web site and found that it did not reflect what my direction was to the Agency, and that was a full suspension, not to do any recruiting, not to do anything until such time.

I have a letter that will be delivered to you very shortly that clearly states that I directed that all aspects of the study, including enrollment, be suspended. To be clear, no additional work is going to be conducted, subject to the external scientific review, both as a science and the ethic.

Senator BOXER. Well, that's a suspension and I appreciate that. But that's not a cancellation of the program. I want you to cancel this program. Because just so you know, in the form that the people get, it says, is there are any risk to me and my family, the answer from the EPA is no, you and your child will not experience any risks from participating in the study.

We further found out that—who's paying for the study? Are you aware of who's paying for the study?

Mr. JOHNSON. There are two sources of funds for the study. One source is EPA, the other is through a Cooperative Research and Development Agreement with the American Chemistry Council.

Senator BOXER. The American Chemical Council.

Mr. JOHNSON. That's correct.

Senator BOXER. Right. So we have this program being funded by the industry that makes the pesticides.

I will close with this. Once more saying, I'm glad you're taking, you know, you changed the voice mail. But you're still continuing to look at this. I want this program canceled.

Let me read to you what the EPA, several EPA scientists expressed, I'm reading from an article, and I'll put it in the record, Mr. Chairman, from November 12, 2004. Critics say EPA study would have harmed low-income children. Several EPA scientists expressed outrage about the study, saying it unfairly targets low-income families, attempting to lure them into an agreement with high-tech gadgets when they may not fully understand the health consequences for their children. It goes on, there is actually a per-

son cited here who says, "This study goes against everything we recommend at EPA concerning the use of pesticides related to children. Paying families in Florida to have their homes routinely treated with pesticides is very sad when we at EPA know that pesticide management should only be used to protect children."

So I'll put that into the record.

[The article referred to follows:]

[From the NewStandard]

#### CRITICS SAY EPA STUDY WOULD HAVE HARMED LOW-INCOME CHILDREN

AFTER SCIENTISTS AND ENVIRONMENTALISTS SLAMMED THE EPA FOR PLANNING A PESTICIDE STUDY CRITICS BELIEVE COULD POTENTIALLY HARM LOW-INCOME CHILDREN, THE AGENCY HAS SENT THE METHODOLOGY BACK FOR REVIEW

(By Catherine Komp)

NOVEMBER 12, 2004.—The Environmental Protection Agency announced that it has suspended a study looking into the effects that pesticides have on children, after top EPA scientists questioned the ethics and safety of the research itself. The \$9 million Federal study, partially funded by an alliance of chemical companies, would pay low-income families almost \$1000, plus electronics and clothes, to maintain current pesticide use in their homes for 2 years.

The Children's Environmental Exposure Research Study (CHEERS) targeted families in Duval County, Florida and was to study the effects on small children of using chemicals and pesticides in the home. In addition to the one-time \$970 payment, the EPA was offering incentives such as a free camcorder, VCR, t-shirts, bibs, and a framed certificate of appreciation. While the EPA's website said it would not ask families to apply pesticides in their home to be part of the study, it does require that parents "maintain [their] normal pesticide or non-pesticide use patterns for [their] household." The EPA would then monitor changes in development of children in the house.

Several EPA scientists expressed outrage about the study, saying it unfairly targets low-income families, attempting to lure them into an agreement with high-tech gadgets when they may not fully understand the health consequences for their children. In an email obtained by the Washington Post, Troy Pierce, an EPA life scientist in Atlanta, said the study "goes against everything we recommend at EPA concerning use of [pesticides] related to children. Paying families in Florida to have their homes routinely treated with pesticides is very sad when we at EPA know that [pesticide management] should always be used to protect children."

Critics and doctors say household cleaners and pesticides are linked to neurological damage in children and they criticize the EPA for stating on its CHEERS web site that the study will not cause risks to children or parents.

Environmentalists have also criticized the CHEERS study. Dereth Glance is program coordinator for Citizen's Campaign for the Environment, a nonprofit organization focusing on issues surrounding public health and the environment. In a press statement, Glance said the EPA solicited participants from hospitals and clinics in Jacksonville, Florida that serve primarily low-income families and people of color.

In its documentation on the study, however, the EPA says that it is finding potential participants through a variety of methods, including private doctor's offices, daycares and word of mouth. The agency adamantly denied targeting low-income families.

Maria Lawson, spokesperson for the American Chemistry Council, which provided \$2 million toward funding the \$9 million EPA study, told the Post that the group "continues to strongly support the study because of the great importance of increasing understanding of the exposures of young children to pesticides and other chemicals they naturally encounter in their daily lives."

Linda S. Sheldon, an EPA spokesperson, told the Post that the study was important because there is so little information about how small children absorb harmful chemicals. She also said the study's design had been reviewed by independent scientists, officials at the Centers for Disease Control and Prevention, as well officials at the Duval County Health Department.

Since the study was suspended this week, the EPA announced it will reexamine its design and submit it for review to a panel of independent experts. An assessment is expected next spring.

Senator BOXER. Then there is an article in the St. Petersburg Times, November 2, 2004, the U.S. Environmental Protection Agency has announced a project with the innocent-sounding acronym CHEERS, and it explains it, they will be given \$970, a camcorder and all the rest. It says, "Then over the next 3 years, researchers will stop by every 3 months or so to determine which chemicals the children are exposed to and how they may be affecting their development."

Would you want that for your new grandchildren? I'm a grandma. I don't know that you'd sign them up.

Here's what it says. "No, this isn't a sick joke, but an EPA-approved study that is partially funded by the chemical industry." So Mr. Chairman, I've said my piece, I so appreciate getting another few minutes here. I stick with what I said. We know enough, as your EPA scientists have said, that this is wrong, morally wrong. We should cancel this program. I have heard wonderful things about you, Mr. Johnson. I hope you will take to heart what I said, because I certainly would like to see you do your job.

But if you don't cancel this project, I don't really understand it, because science has already told us that our children are the ones we must protect from pesticides, not encourage parents to keep spraying for 2 years while we see the damage to their children. It's an outrage, and I'm hoping that by tomorrow you have another letter on my desk that says, I've taken a further step and canceled the program.

Thank you.

[The articles referred to follow:]

[From the St. Petersburg Times]

[November 2, 2004]

Experimenting on Children

(South Pinellas Edition)

FLORIDA.—The U.S. Environmental Protection Agency has announced a project with the innocent-sounding acronym CHEERS. Parents in the Jacksonville area who want to participate will be paid up to \$970 and given a video camcorder and "an official, framed Certificate of Appreciation." While that might sound tempting, especially to a family looking for a little help with Christmas this year, anyone interested might want to know what CHEERS stands for before signing up—Children's Environmental Exposure Research Study.

More specifically, the EPA wants 60 families in Duval County who have a child under the age of 13 months to continue applying household pesticides as usual. Then, over the next two years, researchers will stop by every three months or so to determine which chemicals the children are exposed to and how that might be affecting their development. No, this isn't a sick joke, but an EPA-approved study that is partially funded by the chemical industry.

The EPA says the information will help the government protect children from harmful chemicals in the future. While that goal is noble, the methods being considered are indefensible. Even some of the regulatory agency's own scientists are coming to their senses and beginning to question the plan among themselves, according to e-mail messages obtained by the Washington Post.

Suzanne Wuerthele, EPA regional toxicologist in Denver, said she is afraid the study takes advantage of poor families and fails to inform them of the risk to their children. "It is important that EPA behaves ethically, consistently and in a way that engenders public health," she wrote, adding that if the agency fails to do so, its "reputation will suffer."

Unfortunately, it is the children involved in the study that stand to suffer the most. By offering money and a camcorder (which will be used to record the child's

activities), the EPA is obviously trying to entice low-income families, a group that is also less likely to be aware of the dangers.

Linda Shelton, acting director of the EPA's Human Exposure and Atmospheric Sciences, said the agency would monitor chemical use in the homes and inform parents if a child's urine showed significant levels of pesticides, but that misses the point. The agency's first responsibility is to protect children, not to stand by as even a few are exposed to needless risk.

A humane and just society doesn't do experiments on children that even appear to treat them as lab animals. The EPA should cancel this study and find an ethical way to research the chemical threat to children.

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[Sarasota Herald-Tribune]

[November 3, 2004]

#### Playing with Poison; EPA Pesticide Research Doesn't Pass the Smell Test

FLORIDA.—Maybe it's time for someone to throw a tent over the Environmental Protection Agency and fumigate it for bad ideas.

In a mind-boggling move, the agency recently announced plans to accept \$2 million from the American Chemical Council to conduct a 2-year study of the effects of pesticides on 60 infants and toddlers in Duval County.

As if the inherent conflict of interest in accepting industry funding weren't bad enough, the proposal gets worse: The EPA is offering \$970, plus free clothing and camcorders, to every family recruited.

Astonishingly, what the agency isn't offering is to intervene if the kids begin showing levels of poisoning that would cause health damage or developmental problems.

Scientists inside and outside the EPA oppose the plan, which bears the Orwellian acronym of CHEERS, short for Children's Environmental Exposure Research Study.

There's certainly merit in studying the effects of pesticides on small children, but this approach raises serious ethical—not to mention common-sense—questions.

Public Employees for Environmental Responsibility, a watchdog group, says the study fails to explain to families the potential risks. Critics contend that poor families will be lured into the program without fully weighing the pros and cons.

The study is also objectionable because of the financial role of the pesticide industry. Surely our government isn't so hard up for research money that it has to take cash from the very industries under scrutiny?

CHEERS is nothing to cheer about. The EPA should squash this idea flat.

Senator VOINOVICH. [Presiding.] Thank you, Senator Boxer.

The Chairman has asked me to preside while he's voting. I will take this opportunity to do one thing that I think is important for the record. Maybe, Mr. Johnson, I might bring you up to date on what's happened in Clear Skies, I know you've followed it somewhat, but it wasn't in your bailiwick.

Mr. JOHNSON. Yes.

Senator VOINOVICH. I think I'd like to point out that this committee has had 24 hearings, including 2 this year, on multi-emissions issues. At the business meeting, we had thousands and thousands of pages of information displayed on a table right in front of this committee. EPA career staff, not the political people, have stated that this is the most analysis that they could ever remember being performed for a single legislative proposal. That's pretty significant.

In truth, we have more information on Clear Skies and the other proposals than any other bill going through this committee. Many of the members of the committee on the other side had none of this information when they voted for the Jeffords bill back in 2002. I remember that, I was very much a part of that negotiation. The fact is, we had zippo in terms of information on that, and this committee voted it out.

We probably have more information about these multi-emission proposals than the whole Congress had when it passed the Clean Air Act amendments in 1990. There are a lot of things that were speculative, but Congress decided to go forward with it. Now we have even more information than 1 month ago, due to the finalizing of your Clear Air Interstate Rule.

I would also like to point out to you and for the record that the Energy Information Administration analyzed all three of these bills, the ones that we're asking for an analysis, the Jeffords, the Carper and Clear Skies on May 2004, a little over a year ago. EPA did an analysis of all three bills. I asked them to do that, and they interpolated the effects of all three bills from the Clear Skies analysis. EPA career staff has told me and probably has told you that if we did what Senator Carper wants, it would take us several months and quite frankly, we would end up with very little new information than what's already on the table. I want you to understand that I think we have enough information to get started with the negotiation and come up with numbers.

Besides that, I think it's something that needs to be pointed out, all of the environmental groups, some of them sitting here, have done an analysis of these bills. So have the industrial representatives. We'll get them in the room, how do you feel about this, environmental groups? They'll say, we feel this way about it. Well, how do you feel about it, industry? Well, we have it.

People really are genuine about doing something about this issue and getting away from what I refer to as a litigation environmental policy that has done nothing basically for the environment and certainly has put this Country behind in terms of our energy and our economy. This is a very important area. I wish Senator Carper were here right now to hear this. But I think it's important that this be in the record, and that this Senator is willing to get started tomorrow if somebody is willing to come to the table, and let's start using some numbers, once it's over, we'll ask you to do another complete analysis before the bill hits the floor.

But to sit here and say, we're going to wait until some information comes in, hell will freeze over before we get a bill out of here. We can hardly find time to get a highway bill out on the floor here in the Senate. That's reality.

Great Lakes, you and I have talked about it. I am very concerned about the leadership that we have for Great Lakes. I'd like you to comment to me about how you feel about it. Your predecessor, Mike Leavitt, spent a lot of his time, some would say too much of his time, on it. The fact is, I'd like to hear from you. Are you familiar with it, and how do you feel about it?

Mr. JOHNSON. Senator, first of all, thank you for your leadership on Clear Skies. Thank you for your comments on the analysis. I stand ready to assist you and other Members of the committee to help in any way I can, because I think Clear Skies is still the right thing to do.

With regard to the Great Lakes, I certainly was working with now-Secretary Leavitt in his leadership with the Great Lakes. The Great Lakes are great, and the phrase that captured what the effort is all about is a regional collaboration of national significance. I think that is very appropriate. Because it really is a significant

area of effort to bring together multiple groups, whether from the States, from the cities, from tribes, from all aspects of the Federal Government. Mike Leavitt was clearly the leader.

If chosen to be confirmed, I certainly plan to move into those shoes. Those are big shoes to fill. I have already attended two of the executive committee meetings to get briefed by all the participants and begin actively working. I'm excited that we have a great effort, and we're moving rapidly with great cooperation from everybody.

So Senator, you have my personal commitment. This is an important task. Not to mention, it's also an executive order by the President. I intend to fulfill that.

Senator VOINOVICH. I'm very happy to hear that.

One of the things I also suggested to the Administration is that this might be a wonderful thing that we can collaborate on with the Canadians. Recently, we had more differences of opinion, and this might be something where we can join with them in a very positive issue. It could be the most significant restoration in the world by a bilateral effort between the United States and Canada.

Senator Carper and I have introduced bills, as I mentioned earlier, in terms of science. You're a scientist. The question we have is, what is your thought about having somebody specifically be designated as that science person in the EPA? We never really did get a chance to find out what Mike Leavitt felt on that. There has been some pushback over the last several years on it, and I think it's a great idea.

It adds to, I think, the credibility of the Agency to have someone there that's on the science side, both for those that are from the business side and from the environmental side. How do you feel about it?

Mr. JOHNSON. I think that since I honestly believe science must be the foundation of all the Agency's decisions, I'm fully supportive of having a senior scientist. In fact, organizationally we have, our principal science organization is our Office of Research and Development. In addition to that, we do have a senior scientist position which, if confirmed, I would move to fill with a highly qualified scientist.

I think it's important. As I said, it's the foundation of our Agency decision. So the more help we can have in the science arena, I think the better decisions we will make.

Senator VOINOVICH. I would really like to have you look at it and really focus on it. Maybe Senator Carper and I could come and see you. If you don't think it's a good idea, tell us why you don't think it's a good idea. We think it is. But perhaps after you review it, you may say, this is not a bad idea.

The last thing is the issue of the rules and regulations in regard to sewer overflow-combined sewers. First of all, I think you have an obligation to come to the Administration and ask them for more money for water and sewers in this Country. I mean, it's abysmal what we're doing in terms of this infrastructure problem that we have.

The other thing that I'd ask is this, that you have all these rules and regulations that are forcing local communities to do a bunch of things that cost a whole lot of money. One of the examples that

I have is the city of Akron, OH, that's agreed to go forward and do what they're supposed to do, the Ohio Environmental Protection Agency has signed off and said, it's OK. They come to Washington and Washington says—and by the way, they agreed to 30 years—Washington says, no, it's got to be done in 15 years.

It seems to me that some common sense approach should be given to some, if you're not going to provide the money to these cities and say, hey, baby, it's your job to fund it, then for goodness sakes, it seems to me the Agency has a responsibility to cooperate and say, OK, you know, you can't do it in 15 years, but you are going forward with it, we can monitor your performance and I really would appreciate your looking into that.

Mr. JOHNSON. I would be pleased to. I will do that. Just a comment, you hit, I believe, one of the major issues facing the Agency in the water arena. That is, it's true that as a Nation we have an aging infrastructure. The cost to our cities and communities for trying to address that, the costs are staggering, far exceeding EPA's budget.

So I look forward to working with you and other members of this committee and others to look at what are some innovative ways that we can deal with this reality of aging infrastructure, and of course combined sewer overflows are one aspect of that issue.

Senator VOINOVICH. Thank you.

Senator INHOFE. [Presiding.] Thank you, Senator Voinovich.

Senator Carper, for 4 minutes.

Senator CARPER. Let me just reiterate for all of us, especially for Mr. Johnson, what I've asked for and requested be submitted back in the early part of March. First of all, economic impact analysis of the manager's amendment of Clear Skies; the Chafee-Carper, et al. proposal; and finally, Senator Jeffords' proposal. That's an economic impact analysis of those.

Second, we've asked for modeling of the air quality benefits of each of these bills. Third, we've asked for other, more focused analyses to better understand the mercury hot spots issue and the impacts of the proposed changes to resource review.

I said earlier in my statement, in trying to negotiate with our friends on the other side and with the Administration, it's hard to know, for me at least, it's hard for me to know what to offer when we get down to the final horse trading. I don't even know the benefits of my own bill that several of us have introduced brings to my own home State. I know Clear Skies doesn't do enough and Clear Skies won't solve Delaware's air quality problems.

So I don't think we're being unreasonable here. We're just going, my fears are we are going to spend a lot of time arguing about whether or not you're going to provide the scientific analysis that is, I think, if not available is achievable in fairly short order. We spent a lot of time arguing about whether or not you're going to provide it. Instead of us having good data on which to figure out where to draw the line on SO<sub>x</sub> or NO<sub>x</sub> or mercury or CO<sub>2</sub>, we're just going to waste time, spin our wheels, that's not what I came here for, and I'm sure it's not what you're up to either.

Let me just ask, if I could, Mr. Johnson, to your knowledge, how many IPM analysis has EPA conducted in the development of the Administration's Clear Skies proposal? Any idea?



Mr. JOHNSON. Senator——

Senator CARPER. I'm told it's 20 or 30.

Mr. JOHNSON. I don't know. As you well know, IPM was just one of the, sort of the first step modeling that we do on air quality, and then followed by another, more advanced model that really takes weeks to run, and then followed by that with other model called BENMAP that gets into benefits assessments. So that combination of all those models to give the most complete picture and the best analysis is literally months worth of work.

Senator CARPER. How many air quality modelings have been done on Clear Skies, just roughly?

Mr. JOHNSON. I don't know, sir, but I would be happy to get back to you with that.

Senator CARPER. I was told 10 or so. If you could, for the record, that would be great.

Mr. JOHNSON. I would be happy to.

Senator CARPER. Let me just ask, could the Administration put together a meaningful proposal without that kind of modeling?

Mr. JOHNSON. As I understand, certainly in the historical context of the original Clear Skies proposal, there was extensive modeling that had been done, put that on the table.

Senator CARPER. Did EPA conduct any analyses that you are aware of in preparation for the clean air rule? If so, any idea what was done?

Mr. JOHNSON. Again, extensive analysis and in fact, there is, I think, literally thousands of pages of analysis in the docket now on the Clean Air Interstate rule.

Senator CARPER. Why did EPA choose not to interpolate the air quality and economic impacts of this rule from the modeling that was already done for Clear Skies?

Mr. JOHNSON. Excuse me, sir, which rule?

Senator CARPER. The CAIR rule.

Mr. JOHNSON. The CAIR rule?

Senator CARPER. Yes, let me ask you again. Why did EPA choose not to just interpolate the air quality and economic data, economic impact of this rule just by modeling that was already done from Clear Skies?

Mr. JOHNSON. Certainly there was, I'm sure that there was interpolation, at least what I recall from some of the early briefings before all the detailed analysis was done, to set the stage and put the marker as directionally where we should be going, to make sure that we're spending our resources as wisely as possible, and not doing needless analysis, obviously. So there was that.

But then we did do a detailed analysis, obviously, this is a rule-making, it was a rulemaking, it is a rule. Unfortunately, as you know, there used to be a process of proposing a rule, finalizing a rule and then moving it forward. It has now been replaced with proposing a rule, finalizing a rule then litigating.

So we have to be ever mindful of that for all of our regulations and particularly for those that we know are associated with great controversy. So there was a great deal of analysis done, both for understanding the science and making sure that we are being appropriately public health protected and moving the intent of the

Clean Air Act, at the same time, recognizing that we know we live in a litigious society.

Senator CARPER. Mr. Chairman, I did not come here to litigate, I came here to legislate and to find common ground. I'm convinced we can find it. Doing the analysis that we've asked for would be a huge help toward finding that common ground.

Senator INHOFE. Thank you, Senator Carper.

The Chair will ask unanimous consent to include in the record at this point a letter of endorsement by Senator Lugar for the confirmation of Mr. Johnson. Without objection, let it so be ordered.

[The letter referred to follows:]

RICHARD G. LUGAR  
 INDIANA  
 306 HART SENATE OFFICE BUILDING  
 WASHINGTON, DC 20510  
 202-224-4814  
 senator\_lugar@lugar.senate.gov

COMMITTEE  
 FOREIGN RELATIONS, CHAIRMAN  
 AGRICULTURE, NUTRITION, AND FORESTRY

## United States Senate

WASHINGTON, DC 20510-1401

April 4, 2005

Senator James Inhofe  
 Chairman  
 U.S. Senate Committee on Environment and Public Works  
 410 Dirksen Senate Office Building  
 Washington, DC 20510-6175

Mr. Chairman,

I write to share my support of Steven L. Johnson's nomination as the Environmental Protection Agency's (EPA) Administrator. Mr. Johnson has witnessed and participated in the evolution of our nation's environmental laws and regulations during his more than two decades of service at the EPA. Mr. Johnson will become the agency's first career employee to serve as the Administrator. His intimate knowledge of the Agency lends him a unique perspective on the inner workings of our nation's environmental protectorate.

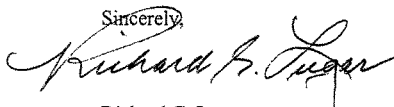
Mr. Johnson received his undergraduate degree from Taylor University in my home state of Indiana, and later a graduate degree from the George Washington University. In addition to currently serving as the EPA's Acting Administrator, Mr. Johnson has also served in leadership roles at the EPA's Office of Prevention, Pesticides, and Toxic Substances, and Office of Pesticide Programs.

Mr. Johnson's work has earned him numerous awards and citations. In 2001, Mr. Johnson received the Presidential Rank Award for distinguished executives for sustained extraordinary accomplishments. This is the highest award that can be given to a civilian federal employee. Prior to that he received the second highest award bestowed on federal employees, the Presidential Rank Award for meritorious executives for sustained accomplishments.

I have also had the pleasure of working with Mr. Johnson while serving as the Chairman and Ranking Member at the Senate Committee on Agriculture, Nutrition and Forestry.

I believe that Steven L. Johnson will be an effective Administrator at the EPA. His knowledge of environmental law and the intricate functions of the agency, coupled with his ability to balance environmental stewardship and economic prosperity should serve our nation well.

Sincerely,



Richard G. Lugar  
 United States Senator

RGL/awa

Senator INHOFE. All right, Senator Jeffords.

Senator JEFFORDS. Mr. Johnson, you revoked Administrator Browner's decision that it was "necessary and appropriate" to reduce mercury emissions at each and every electric generating unit in the country, using the maximum achievable control technology as required in section 112 of the Clean Air Act. Then you signed a rule that would allow 200 or more old and dirty power plants to avoid making any mercury reductions until the year at least 2020. Not to mention toxic trading.

How is this approach that you and the Bush administration have taken more protective of public health than the approach you are deeply obligated to take under section 112?

Mr. JOHNSON. Senator, as part of our regulation of mercury, we were looking at mercury in the context of two other air pollutants on both SO<sub>x</sub> and NO<sub>x</sub>. We were already moving toward regulation of those.

As we were looking at the technologies associated with the SO<sub>x</sub> and NO<sub>x</sub>, it became apparent that there were co-benefits, in fact, significant co-benefits, that the same types of pieces of equipment that would be put on for controlling SO<sub>x</sub> and NO<sub>x</sub> would actually have a significant impact on mercury, particularly mercury deposition and the kinds of mercury that we're concerned about, methyl mercury in and around plants, particularly the water bodies, because of concern for fish.

As we looked through what our regulatory tools are, indeed section 112, the same section, also authorizes the Agency to examine alternatives. So it doesn't say that we have to use a particular or a prescribed approach, such as the maximum available control technology, but in fact we could examine alternatives. Given the fact that we were already receiving and would receive significant co-benefits as a result of the Clean Air Interstate rule, we chose what we thought was the most health protective, the most cost efficient approach, and that was section 111, which is the cap and trade you referred to.

Senator JEFFORDS. Thank you, Mr. Johnson. I have written repeatedly, repeatedly to the Agency detailing my objections to the Administration's illegal and unauthorized approach on mercury. In March 2004, 45 Senators warned Administrator Leavitt against adopting the rule which you have signed, because it fails to comply with the Clean Air Act.

Were you ever advised by any person over at the Agency that the final mercury rule would not withstand judicial review?

Mr. JOHNSON. No, in fact, my staff advised me that it would withstand judicial review. Of course, you are probably well aware that the Agency has now received a petition, or I think maybe more than one petition, for staying the rule. But certainly the staff has, my staff, legal staff, and our air staff advise me that the rule was legal and defensible.

Senator INHOFE. You may continue, Senator Jeffords.

Senator JEFFORDS. Mr. Johnson, based on the response you gave Senator Carper today, are you telling this committee that you will only undertake research and provide technical assistance for committee members if it is a bipartisan request that includes the Chairman and Ranking Member of the full subcommittee?

Mr. JOHNSON. Let me try to be clear, Senator. What I'm trying to do is to walk what I believe is an appropriate and certainly in 24 years of history at the Agency, an appropriate path. That is, with the intent to pass a piece of legislation, in this case Clear Skies, and there would appear to be interest in having a bipartisan approach to passing Clear Skies, that in order to take the kind of analysis, it literally takes, to go through all the models that I referred to for all the various scenarios, literally many weeks to do.

I believe it is a good approach for us to sit down, make sure that we are all on the same page, make sure that we are all supportive of having the right input parameters, or at least understanding what the input parameters are, because the last thing that I would want to have happen is to model your proposal or model Senator Carper's proposal or model the Chairman's mark or model some other, and then get into endless debate over, you used the wrong input parameters, you've done this wrong, we can't possibly come to a compromise.

So I think it's good practice, and again, in my 24-year history here, when we're faced with the opportunity to have a bipartisan piece of legislation, that the best approach is for us to work together and to come up with, OK, here's the kind of analysis that needs to be done. This is not a day's worth of work. This is weeks and months worth of work which I'm committed to investing if we all are understanding what ones we're going to do and what approach we should take. Again, I think it's important that, for me and certainly for the Agency, that I want to meet Senator Carper's needs, I want to meet Senator Voinovich's needs, I want to meet your needs and I want to meet the Chairman's needs.

So what's the best way of doing that? Not for me to go off and independently try to address those, but rather to try to say, let's work together in a bipartisan way to figure out what are the analyses that need to be done, what are the base set of assumptions that need to go into those analyses, and then we can move forward. But if there is not a desire to do that, or if there is not a desire to really work toward legislation, then I would ask, please save us from spending resources that we don't have to spend.

As I said, I think it's the right thing to do, and I look forward to trying to work with you all in a bipartisan way to achieve that.

Senator JEFFORDS. I assure you, and I am sure my partner would agree with me that we want to work in cooperation, we want to do everything we can to maximize the utility of the resources we have and come up with a legislation which is going to solve the problem.

Senator CARPER. Senator Jeffords, would you yield to me for a minute? Mr. Johnson, was the extensive analysis EPA has done with respect to Clear Skies over the past 4 years a direct result of a bipartisan request? If so, who made that request?

Mr. JOHNSON. The Clear Skies legislation was an Administration proposal. So it was done to support the Administration's original proposal.

Senator INHOFE. All right, thank you very much.

I want to get to our last member who has joined us, Senator Warner. We have gone through two rounds of 4 minutes of questions, you certainly have 8 minutes if you would like to use it.

Senator WARNER. Mr. Chairman, I won't use it. Again, I have had the opportunity to work with and visit with this distinguished public servant. I intend to lend my total support.

Let me clarify this colloquy which I moved in here to catch the tail-end, to make sure. We have pending the bill which the Chairman has, you're not suggesting that be delayed, is that it? Do you think we have to independently allow you to do the studies and the time, and come along at a later date?

Mr. JOHNSON. No, I would be thrilled to work with the Chairman's mark on the piece of legislation and to work to move that forward. But unfortunately, Senator Warner, not everyone has signed up for that approach.

Senator WARNER. I see. All right. That makes it more clear.

Senator INHOFE. No further questions, Senator Warner?

Senator WARNER. No, thank you, Mr. Chairman.

Senator INHOFE. All right, we will now dismiss the first panel and thank you for your tolerance and your time and ask the second panel to come forward.

I would say to Mr. Johnson that, while the other panel is being seated, I will be submitting a question for the record concerning the review of the prevention and control counter-measures. I talked to you about it before, in Oklahoma we have oil producers, manufacturers, farmers, airports that would like to have clarification of this particular issue. So we will be submitting a question for the record on that.

Senator INHOFE. I want to welcome our second panel and thank you for your patience. It is my intention, as you heard this morning, to have our first panel over with by the time we had to go into our joint session. It didn't work out that way. I have already introduced you once when we first began. What I would like to do as have you, those who wish to do so, give brief opening statements. Do your best to go 3 minutes if at all possible. Your entire statement will be made a part of the record.

We will start with Mr. Luna.

**STATEMENT OF LUIS LUNA, NOMINATED BY THE PRESIDENT  
TO BE ASSISTANT ADMINISTRATOR FOR ADMINISTRATION  
AND RESOURCE MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY**

Mr. LUNA. Thank you, Mr. Chairman and members of the committee. I am honored to be appearing before you today as President Bush's nominee for Assistant Administrator for Administration and Resources Management at the Environmental Protection Agency. I have an opening statement and I appreciate that you will allow me to insert it in the record.

Senator INHOFE. It's in the record.

Mr. LUNA. Thank you, sir.

With me here today is my wife, Bonnie, whose love and encouragement has afforded me this opportunity to be here. She is a gift I did not merit, and I would not consider taking this job without her steadfast support.

Also here are very dear friends whose support I also cherish: Tom and Jacquie Meeks, Jennifer Walker, Chris Van Buskirk and Tony Palm. Not here are my brother Joe and his wife, Cindy, who

live in Texas, nor our parents, whose names I mention in honor, Bernardo and Anamaria Luna. They are now deceased. My parents made what remains to me an incredible sacrifice: sending my brother and me to the United States from Cuba to escape Communism, to ensure that we lived in freedom—even if it meant we would never see each other again—because they realized that liberty is the most precious gift on earth. By God's hand, they, too, were able to escape, and their pride at seeing this day come would have been unbounded.

I am of course grateful to the President that he would see fit to nominate me, and to the U.S. Senate for considering me for this post. I must give the glory for this day to my Lord and Savior, Jesus Christ.

Should you and your colleagues see fit to confirm me as Assistant Administrator at EPA, I would rely on three principles to ensure the Agency's resources are well managed: accountability, transparency and results.

I would expect to be held accountable for the EPA's resources. It is a responsibility I would not take lightly, and I would make sure goals are accomplished and promises are kept.

I would insist that issues are handled and decisions are made with transparency, because the process, if it's open, produces confidence in the final product. I would focus on results. I would not confuse activity with progress. I would see that issues were dealt with straightforwardly and resolved.

In the interest of time, I will refer you to the text of my statement, and I thank you so much for the privilege of appearing before you.

Senator INHOFE. Thank you very much.

Mr. Woodley, it seems like you've been before us several times, but you might have something new to say.

**STATEMENT OF JOHN PAUL WOODLEY, JR., NOMINATED BY  
THE PRESIDENT TO BE ASSISTANT SECRETARY OF THE U.S.  
ARMY FOR CIVIL WORK**

Mr. WOODLEY. It is a great privilege to be once again before the committee. I want first to express my appreciation to you, Mr. Chairman, for promptly scheduling this hearing and my deep sense of privilege and honor to be on the panel with these other distinguished public servants. I am very much mindful as well of the confidence expressed in me by President Bush and Secretary Rumsfeld who submitted my nomination for this important post within the Department of the Army.

The Army Corps of Engineers and its civil works function, encompassing navigation, flood control, water resource development and environmental improvements, has for 200 years contributed greatly to the prosperity and well-being of our Nation. I deeply appreciate the courtesy of the committee, and if confirmed, I look forward to working with the Chairman and all members of this important committee to address the vital navigation, flood control, water resource and environmental challenges of the Nation.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you very much, Mr. Woodley.

General Riley.

**STATEMENT OF MAJOR GENERAL DON T. RILEY, NOMINATED  
BY THE PRESIDENT TO BE PRESIDENT AND A MEMBER OF  
THE MISSISSIPPI RIVER COMMISSION**

General RILEY. Mr. Chairman, thank you for this opportunity to testify. I also have submitted my full statement for the record, and also would like to thank you for this opportunity to serve not only in uniform but serve the Army Corps of Engineers, as well as the Mississippi River Commission.

I am struck by the visionary leadership of the Congress in 1879 in establishing the Mississippi River Commission to look at a basin-wide approach to water resources, engineering and policy advice. We see across the Nation today many basins, watershed basins taking much the same approach for sustainable management and development of their water resources. Some of the common attributes we see today were evident in the commission back in 1879: partnership, listening sessions, inspection trips on the river and a broad representation.

So I feel confident that what you see today with the Mississippi River Commission and what the Congress began in 1879 will continue with the work of the Commission. I just want to close by thanking you for the opportunity to serve and thanking you for your leadership and as well for what you do to support the great people in the Corps of Engineers.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, and I would only ask you to keep in mind that my State of Oklahoma uses the Mississippi in order to reach our port at Catoosa. Keep that in mind.

[Laughter.]

Senator INHOFE. General Grisoli.

**STATEMENT OF BRIGADIER GENERAL WILLIAM T. GRISOLI,  
U.S. ARMY, NOMINATED BY THE PRESIDENT TO BE A MEM-  
BER OF THE MISSISSIPPI RIVER COMMISSION**

General GRISOLI. Mr. Chairman and members of the committee, thank you very much for the opportunity to be here before you today as the nominee for the Mississippi River Commission.

Mr. Chairman, as General Riley has already stated, some of the highlights of the Mississippi River Commission and its role, et cetera, what I would like to is just briefly talk a little about some of my qualifications for this particular position.

As the commander of the northwest division, I have gained an appreciation for basins, overseeing both the Missouri and the Columbia River, understanding the complexities, seeing the need for sustainable solutions to basins themselves and watersheds. Also during that period of time, since July 2003, I have been a member-designee for the Mississippi River Commission and have been able to go on several trips which enabled me to listen, conduct inspections with the other commissioners and really partner with some of the stakeholders on the river and understand the great natural resource that we have there.

I am committed, if I am confirmed, to look for balanced improvements in the Mississippi River and look for best engineering practices. I want to thank you today for this opportunity to appear be-



fore the committee, and I look forward to addressing your questions.

Senator INHOFE. Thank you very much, General.  
Mr. Rappoport.

**STATEMENT OF D. MICHAEL RAPPOPORT, NOMINATED BY  
THE PRESIDENT TO BE A MEMBER OF THE BOARD OF  
TRUSTEES OF THE MORRIS K. UDALL FOUNDATION**

Mr. RAPPOPORT. Thank you, Mr. Chairman, members of the committee. I very much appreciate this opportunity to present myself as a Presidential nominee for the position of trustee of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation.

It is a particular privilege for me to be nominated by President Bush to serve another term on the Foundation's board of trustees. With your permission, sir, I do have a detailed statement that I would appreciate having submitted for the record, along, Mr. Chairman, for appropriate reference our recently released Foundation annual report.

I am very pleased also to be accompanied by my wife, Suzi, and our son, Sloan. Sloan had worked for a number of years on the Senate side.

I also would like to express my appreciation to Senator John McCain and Senator Jon Kyl for their letters to the committee on my behalf. If appropriate, I would respectfully request that they be included in the record as well.

Finally, on behalf of the Foundation Board of Trustees and our dedicated staff, I am very pleased to report that since we began operation in 1994, through the strong support of the Congress, the Foundation has awarded 755 scholarships, 18 Ph.D. fellowships, and administered 114 internships for Native American and Alaska Native college students pursuing careers in health care and tribal policy. We also have hosted 7 major conferences on contemporary environmental and Native American issues, and we have sustained support for the Udall Center for Studies in Public Policy at the University of Arizona.

The Foundation also oversees the activity of the U.S. Institute for Environmental Conflict Resolution created by Congress in 1999. Located within the ambit of the Foundation is the Native Nations Institute for Leadership and Management and Policy, all of which, Mr. Chairman, we believe contribute mightily to the legend of Congressman Udall.

As per the committee's request, I am prepared to answer any questions you may have. I am also willing to appear at the request of any duly constituted committee of Congress as a witness. Finally, I know of no matters that would put me in conflict of interest with the board of trustees, should I be confirmed by the Senate.

Senator INHOFE. Thank you, Mr. Rappoport. I would like to ask all of you the same two questions, you can answer one at a time, starting with Mr. Luna, are you willing to appear at the request of any duly constituted committee of Congress as a witness?

Mr. LUNA. Yes, sir.

Mr. WOODLEY. Yes, sir.

General Riley. Yes, sir.

General Grisoli. Yes, sir.

Mr. RAPPOPORT. Yes, sir.

Senator INHOFE. Do you know of any matters which you may or may not have thus far disclosed that might place you in any kind of a conflict of interest if you are confirmed in this position?

Mr. LUNA. No, sir.

Mr. WOODLEY. No, sir.

General Riley. No, sir.

General Grisoli. No, sir.

Mr. RAPPOPORT. No, sir.

Senator INHOFE. All right, fine. We will begin a series of 5-minute rounds. I think we are going to try to keep it to one round because of the time that's already gone by. I only have one question, that is, we'll start with Mr. Luna.

We have established a policy that's worked very well just in the last year, concerning some of the grant recipients on discretionary grants. It's done quite well, we're posting them, there is a lot of sunlight of this, so people know just who is getting the grants, who is applying for the grants to enhance competition. We plan to expand that program. I would ask you if you are in agreement with what we are doing and will help us to expand that program.

Mr. LUNA. Mr. Chairman, I approach the \$4 billion a year in grants EPA provides from the standpoint of a taxpayer. I would very much like to make sure that the dollars are spent in a way that advances the interests of the American people and produces environmental results.

I know that the Agency is in the midst of implementing a five 5-year strategic plan for grants administration, but I would like to look at that plan with fresh eyes and make sure that it is truly results-oriented. I will work very closely with the staff that developed the plan and also with this committee to make sure that we get the desired results.

Senator INHOFE. Would you agree that we could expand this to include disclosure of all affiliated programs and organizations?

Mr. LUNA. One of the things that I would like to discuss with Mr. Johnson, if you choose to make him Administrator, is how we can greatly expand the reach and transparency of the program to make sure that everything is on the table, so that people can see for themselves what moneys are going to whom, who is making application, and what is being processed before grants go out the door.

Senator INHOFE. Very good, thank you.

Senator Jeffords.

Senator JEFFORDS. First of all, I would like to thank you, Mr. Woodley, for coming to Vermont. I know you spent some time with us and you participated in our water resources workshop along with Brigadier General Temple, Colonel Coaming, Colonel Polo, the staff from the New England and New York districts and the North Atlantic division. It was a wonderful time and we got a lot out of it.

This is the second year we have had listening sessions. They have helped us to identify water resources issues throughout the State. Thank you for providing that service.

First of all, as you know, we have not had a Water Resources Development Act, WRDA, since 2000. This committee passed WRDA

in 2004, but the bill did not make it to the Senate floor. The committee is scheduled to consider a WRDA bill next week.

I have heard from members of the Corps of Engineers that we need a WRDA bill. Yet this Administration has not proposed one. It is my guess that they would not support one if Congress did select. Am I correct, that this Administration does not support a WRDA bill?

Mr. WOODLEY. We certainly have not proposed one, Senator. I would have to say that our posture is one of looking at the, working with the House, looking at the Senate to answer questions and to be as supportive as we can of the congressional processes moving forward. There are certainly matters, and I would be wrong to suggest that there are not, that need to be addressed in the context of a WRDA bill. We have gone too long without one.

I am sorry that we have not been able to get ourselves together to propose one. I wish we had. But we have not been able to, but of course, that is, I certainly want to be as helpful and supportive of the committee and the counterpart committee in the House of Representatives as they undertake those deliberations.

Senator JEFFORDS. I guess I want to be clear that I would want to see one.

Mr. WOODLEY. Yes, sir.

Senator JEFFORDS. And that I believe the committee wants to see one. Certainly we will do everything we can to accommodate your needs to make sure we can have one. Do you understand that?

Mr. WOODLEY. Yes, sir.

Senator JEFFORDS. There has been a great deal of debate on reforming the Corps of Engineers as well. You have been at the Corps for over a year and a half. During your tenure, have you taken any steps to change the way the Corps does business?

Mr. WOODLEY. Yes, sir, we have. We have tried to do, I have concentrated my efforts in the area of improving the Corps' analytical capabilities, which are, I have to say, I think are strong and are good, but are not as good as they need to be. In the meantime, the chief of engineers has instituted, in fact General Flowers and General Strong are continuing with that leadership initiative, has instituted the plan called USACE 2012, U.S. Army Corps of Engineers, USACE 2012, to restructure the way the Corps is organized to break down some of the stovepipes, and to flatten some of the organizational structures that evolved the way the Corps does business.

We also issued the Corps' first civil works program strategic plan which sets out our vision for the goals, the broad programmatic goals the Corps should have. It's a revolutionary document. I certainly think that if we are able to change the way the Corps does business to where it's looking at the ways in which the Nation needs to move forward to solve broad-based water resource development problems that we will have done a great work.

I appreciate that this is not the be all and end all of Corps' reform, that a lot of the work, that we are extremely interested in receiving guidance from the committee on ways in which we should implement such things as a robust program of independent review for major projects. I know that was something that was dealt with in both Houses in the last couple of years with the Water Resource

Development Act proposals. We are very anxious to begin work on a statutory framework in which we can undertake that.

In the meantime, we have not forgotten about it. We have undertaken a substantial amount of independent review, particularly for major projects such as the Upper Mississippi River.

Senator JEFFORDS. Thank you for that answer. I look forward to make sure we make progress in that area. Thank you.

Senator INHOFE. Thank you, Senator Jeffords. Senator Warner.

Senator WARNER. I thank you, Mr. Chairman.

I would like to focus my questions—I tend to support all members of the panel—on Mr. Woodley. Mr. Woodley, you and I have known each other for a very long period of time, and it has been a marvelous professional relationship and friendship that we have had. I severely regret that the Senate has not yet confirmed you. You have served now in your position as the Acting for how long?

Mr. WOODLEY. I received a recess appointment, Senator, in August 2003 and served in that capacity until the end of the last Congress. Since then, I have been serving as the Principal Deputy Assistant Secretary.

Senator WARNER. I see, pending the outcome of this nomination now before us by the President?

Mr. WOODLEY. Performing duties as assigned under the authority of the Secretary of the Army.

Senator WARNER. So it was August 2003, then through and including the conclusion of the Congress last year in 2004. That was a period of what, 18 months?

Mr. WOODLEY. Just about, yes, sir.

Senator WARNER. About 18 months. I say to my colleagues on this committee, I have known this fine man, and I will do what I can do help clarify whatever concerns my colleagues now have, continuing or otherwise, with regard to his nomination. I feel not only that this man is ably qualified, but after all, he is a human being and he is entitled to have the benefit of advice and consent of the Congress one way or the other. I feel very strongly about that. You have to get on with your life, and I thank you for accepting this nomination to come up here again and hopefully work our way through this process.

Now, with respect to my, at least one colleague, that spoke to this nomination this morning, I think at this time I will ask unanimous consent that Mr. Woodley can put into the record a statement to give his perspective with regard to what was presented, I think, this morning, to the committee, legitimate concerns of this member of our committee, a distinguished, long serving member, about a problem regarding the Missouri River, as it flows into the Mississippi and the rate of flow, and the problems that his State is now suffering and has suffered for some time with regard to droughts and how those droughts affect certain lakes which are important to his State and the level of the lake is dependent on the amount that is taken out of those lakes by a series of dams operated by the Corps to maintain a certain level and depth of the Missouri and Mississippi Rivers to allow navigation up to a certain point.

Is that a concise description of what you think wherein the difference of views rests?

Mr. WOODLEY. Yes, sir. I should make it clear that I have been to the Fort Peck Lake, I have been to Helena, I have been to Lake Sacajawea at Garrison in North Dakota, I have been to Pierre, SD and met the Governors of these States and seen the conditions. They are very bad.

Senator WARNER. It's serious.

Mr. WOODLEY. Very serious.

Senator WARNER. From the standpoint of those States that embrace the lake.

Mr. WOODLEY. It is unquestionably a major devastating drought condition that has taken the level——

Senator WARNER. Not created, I mean the drought is created by nature?

Mr. WOODLEY. Yes, sir.

Senator WARNER. The levels of the dams, however, is controlled by man through the operation of the Corps?

Mr. WOODLEY. Yes, sir. The situation that existed at the time that I was appointed was that, there was a master manual, which is a regulation that governs——

Senator WARNER. I don't want to take up too much time of the committee. I want you to have, and I have the UC, granted by the Chair, for you to put into the record a full dissertation on this very complicated and extremely technical subject. Such that your perspective, and presumably that of the Administration, is set forth in the record.

Mr. WOODLEY. Yes, sir.

Senator WARNER. I would presume that the distinguished colleague of this morning might wish to avail himself of the opportunity and I so request that he can put into the record such statement as he may wish to.

Senator INHOFE. Yes, without objection.

Senator WARNER. I thank the Chair.

Now, let me turn to a separate issue, Mr. Woodley, and that's one of reprogramming funds in the Corps. All of us here who have the responsibility of operating the committees as chair and ranking member through these many years, we are familiar with the practice of reprogramming, and it's got to be done, it's a discretion that rests with the Administration, subject to certain review by the Congress. I am concerned that the Corps' reprogramming construction funds, contrary to very specific congressional direction of funding, provided to individual unauthorized projects.

Let me point this out. Specifically, I am concerned about funds that I did myself secure with the help of the other Members of Congress from Virginia, to the 50-foot deepening of the inbound channel for the Norfolk Harbor. I met this morning with a distinguished group of individuals from that region. The withdrawal of these funds from the programming is having a severe impact on that region down there.

This is a major project on serving commerce in that region. The Corps has identified the funds that I received to be put toward another project. I am told that the position of the Corps is that the President did not budget for the project, so these funds should be used for another priority.

Now, that is in direct conflict to congressional direction, no disrespect to our distinguished President. But we here in Congress, a co-equal branch, have the right under the Constitution to make certain decisions and we do it, and it's written into legislation and we would hope that the President would respect that. Do you have any comments about that?

Mr. WOODLEY. I do, indeed. I don't know who it is that is telling you this, Senator.

Senator WARNER. Good, speak up loudly for the record. I'm wrong, I'm delighted to hear I'm wrong.

Mr. WOODLEY. That is not the policy, to reprogram, to identify from these funds to reprogram based on whether or not the program was a congressional or Presidential priority. We take, and I have with me General Riley, who in addition to being nominated for the position on the Mississippi River Commission, is also the Director of Civil Works Programs for the Corps of Engineers and in that capacity is in charge of the day to day management of that program.

He and I have made it clear that the budget for program that we are given by Congress is the program that we are expected to execute. If the funds have been reprogrammed, then that is a, that must necessarily, if the reprogramming is according to our policy, it must necessarily have been a reprogramming that took place because of some inability of the project to utilize the funds at the time.

We do have, we do, if a project is given funding and has litigation or——

Senator WARNER. I understand that.

Mr. WOODLEY [continuing]. weather related difficulties or whatever, that is a grounds for reprogramming. But not the grounds that someone is attributing to this situation. I have not looked into this situation, as you know, I am astonished that anyone in this organization would program funding away from any Virginia project while I'm sitting in my current capacity. So I assure you that we will discover——

Senator WARNER. What the problem is and hopefully we can remedy it.

Mr. WOODLEY [continuing]. and understand it.

Senator WARNER. I'd like to get Major General Riley on the record on this question.

Senator INHOFE. Before you do, let me just explain to the committee, our senior member did not have either of his 4-minute rounds for questioning in the first panel or an opening statement. We are giving him more time for that reason.

Senator WARNER. I thank you.

General RILEY. Thank you, Senator Warner, and I can reemphasize what Secretary Woodley said, that you have our absolute commitment that when we have reprogrammed funds away from a project that didn't need it at the time, you have our commitment to put that funding back to that project when it is——

Senator WARNER. I know, but I can't delay this project until you have recycled some funds from somewhere at some future date.

General RILEY. No, sir. When it is needed, it will be there. That's our commitment.

Senator WARNER. Well, I think this is reassuring. I would ask both of you to reexamine it and just give me a letter to that effect. Perhaps both of you can sign the letter, I think that would be helpful.

Last, Mr. Chairman, I thank the indulgence, I ask unanimous consent that a statement by this Senator with regard to the current deliberations within the Corps concerning the use of windmills for wind generation of power, I have said it before, I continue to say it, I have no bias, no prejudice, no objection to utilization of wind power where it is appropriately authorized.

Now, my concern is this project in the State of Massachusetts, which you are well familiar with, and that it is now the subject of some further consideration by the Corps. I filed a letter, which I appreciate your allowing me to put that into the record in the context of this Q and A.

But the authority that the Corps seems to be grasping for, to give this permit, is predicated on an 1899 statute called the Rivers and Harbors Act. Now, in 1899, the only windmills that maybe the Members of Congress had in mind were those that Don Quixote encountered. Folks, that's a real stretch. I've gone back and read that statute. Congress did not have in mind at that time wind power. Wind power has come on the horizon with the advent of technology. It may be a great source.

But I think if we are going to take and put the heavy investment, and indirectly the taxpayers are investing in this because of the public funds given as a subsidy for wind power, and I believe I'm on record as having voted for that, which I think it's important to, these non-renewable sources, to give them support.

But I think to grant a license predicated on that statute is a foundation of matchsticks. At some point, some court will knock it down and there we are. We should have, here in the Congress, the responsibility to enact a framework of legislation to support the exploration of wind power on those parts of the continental shelf that are under the jurisdiction of the Federal Government. There are certain structures to support the licensing in the several States, I believe, or some States have moved in that direction.

But for us to simply go off here and allow this to go forward without, in my judgment, a framework of legislation, much like we have, Mr. Woodley, for oil and gas exploration, am I not correct?

Mr. WOODLEY. You certainly are.

Senator WARNER. Where the Federal Government very carefully supervises this matter, I just think it's wrong. You know, I've been, had hell and damnation descended on me, and even dragged my family into this thing, a former member of the family, that is, I'm no longer a member of a family that owns some property up there. I can't control everything that is written about us. It has nothing to do with that.

It's just that they are thinking about putting the offshore down off my State. I'm intervening in the Massachusetts thing because we could have a duplicate situation off the coast of Virginia. If there is appropriate Federal legislation to support it and Federal supervision, I am all for it. But I don't want to see any windmills off my State put up with a tremendous number of towers and so

forth resting on a matchstick foundation of statutory authorization, period, paragraph.

Do you get my message?

Mr. WOODLEY. I understand it and fully agree.

We are, the Corps of Engineers as an institution and I am personally very uncomfortable with the authority that we are being asked to use. It is not well adapted to the purpose, nor do I believe that the Corps of Engineers, if Congress were to assign this task to one of our Federal agencies, I do not believe that the Corps of Engineers is the appropriate resident for that—

Senator WARNER. For the granting of the licenses.

Mr. WOODLEY. Yes, sir, except to the extent that the, that we should be consulted with respect to navigation channels.

Senator WARNER. Correct, under the 1899 Act, and those features.

Mr. WOODLEY. Absolutely.

Senator WARNER. That's a good answer. Solves my problem. I thank the indulgence of the distinguished Chairman and Ranking Member, my colleague from Delaware.

Senator INHOFE. Thank you, Senator Warner.

Senator CARPER.

Senator CARPER. Thank you, Mr. Chairman. To our panel, welcome, it's good to see all of you here today.

General Riley, I enjoyed talking with you on the phone a couple of weeks ago when we were trying to sort through a reprogramming issue on a couple of beaches in Delaware. We thank you for helping us there.

General Grisoli, I don't have a question for you, sir. Mr. Rappoport, no questions for you, either. Mr. Luna, good to see you, good luck in your new job.

Mr. LUNA. Thank you, sir.

Senator CARPER. I would say to Secretary Woodley, thank you for joining us in Delaware a couple of months ago, on a very cold winter day, as we were—it was cold, the wind was howling, but you were good to come to Rehoboth Beach, Rehoboth and Dewey Beach. Senator Biden and Congressman Castle and I have been working for several years to try to cobble together some money to come in and do a beach replenishment and beach renourishment project. You were good to come and join us in kicking that off.

Subsequent to that, we have learned that there is, the money that had been earmarked for that project had been moved to pay for other things. There is reprogramming stuff that happens from time to time that others have referred to. I tried to track you down a couple of weeks ago, on a Friday afternoon, fairly late, actually, tried to track down General Riley, we were able to find him. I talked to your exec, whose name I don't recall. If I heard it, I would recognize it.

General RILEY. Colonel Balanchi, sir.

Senator CARPER. Yes, there you go. The long and the short is, we I believe were making some progress toward identifying moneys that can be sort of reprogrammed anew and come back in to back-fill this particular project.

I just want to thank you and General Riley and others with whom you work, certainly folks up in your office in Philadelphia,



for all your efforts to help us solve this problem. I would just—yes, sir?

Mr. WOODLEY. I'm hoping not to find that the source of that is a 50-foot channel in the Chesapeake Bay.

[Laughter.]

Senator CARPER. I hope not, too.

Can you just take a minute and give us the latest, an up to date status report on this project, please?

Mr. WOODLEY. Yes, sir. I was briefed on that yesterday. The contractor is, the contract is underway. The total of \$7.6 million has been reprogrammed to the project, including not only funds reprogrammed, programmed back into the project that had been used in prior years on other projects, because of holdups within the Rehoboth project, but also to restore the reductions for savings and slippage.

The Corps of Engineers budget is designed to be run with reprograms. It is an awkward situation, but the way it is run, there is, it is designed to have funds appropriated to projects and then in the case, in any given year, more than 100 percent of our construction appropriation is earmarked to projects, with the understanding that we are doing construction. Construction, buying a project of the Corps of Engineers, a lock, a dam, a levee, a beach renourishment, flood damage reduction, is in no way analogous to going to the supermarket and buying a cake of soap or a box of corn flakes. They are in no way analogous.

We buy these things as time goes on, construction has difficulties, it runs into litigation, it runs into weather, it runs into striking rock where we thought was sand. Difficulties are expected, but unpredictable. So we routinely are required to reprogram in order to not, if we failed, if we did not reprogram, the alternative would be to maintain an enormous carry-forward from year to year. At least in the past, it has not been regarded as the most efficient use of public works funding.

That's a long way of saying that we have, as a policy, it requires, and as we have committed to do so, we have restored the funding and will complete the project. Construction is underway. The contractor began work in February, and I believe that project will be completed by the end of our construction season in this fiscal year.

Senator CARPER. Thanks. Mr. Chairman, if I could have a quick follow-up on this. I understand some of the money, it's \$7.6 million, it's been sort of gathered, reprogrammed to come back and complete this project that was previously approved, it comes from other Delaware projects, which have also been approved. I would just ask that as we move from one Delaware project, fully approved, through this earlier project that we certainly don't end up just robbing Peter to pay Paul, but in the end that we complete all the projects that have been authorized.

Mr. WOODLEY. I understood that that was funded, it was anticipated fourth year earnings that were not anticipated to be needed based on current projections of construction earnings between June and October of the current fiscal year. And that we have either funding in the new fiscal year or reprogrammed no year funding to complete the projects that you mentioned.

Senator CARPER. Excellent. Thanks for your response. Mr. Chairman, thanks for the time.

Senator INHOFE. Thank you, Senator Carper.

Senator Thune.

Senator THUNE. Thank you, Mr. Chairman. Thank you, panel, for your testimony and response to questions today.

Mr. Chairman, if I might, I would ask unanimous consent that a statement earlier with respect to the EPA Administrator, Mr. Johnson, who was here earlier to question regarding an EPA policy as it pertains to cattle feed lot operations, I would like to add that for the record, if it's possible.

Senator INHOFE. Without objection, so ordered.

Senator THUNE. Thank you, Mr. Chairman.

Mr. Woodley, I want to follow up on some conversations that I had with you previously, as well as members of your staff. It has to do with an ongoing battle that the Missouri River Basin States have had over management of the Missouri River. The Upper Basin States, as you know, because you have been there, are experiencing successive years, or continuous now, drought for about 6 or 7 years in a row, which has created some incredibly adverse conditions in the Upper Basin. We are an economy that has come to rely extensively on recreation, the commercial activity associated with the Missouri River, as well as hydropower.

So we have lost or are losing significant economic activity related to recreation and also seeing higher costs associated with energy because of the way the reservoir has been managed, complicated by the drought, has led to less hydropower production there as well.

I guess what I more specifically want to deal with today, and understanding that management of the Missouri River is an issue that many of us in this body and in the other body, the House, disagree with and continue to do that, have disputes over, we have a new master manual in place now which I think will provide some direction. Those of us who think that it didn't go far enough with respect to the Upper Basin States, and I'm sure some of my colleagues from down-river think the opposite.

But in any case, we have a very, very serious situation in South Dakota and the Upper Basin right now because of the drought. Inasmuch as those other issues are very important, we also have one which is of great urgency, and your Colonel Beattie was out in South Dakota last week, who oversees the district out there from Omaha, with respect to the Corps. He had an opportunity to meet with tribal officials, with local, county, municipal, State officials, myself included in that meeting, to talk about a response plan in the event the reservoir reaches a level this summer where there are about 14,000 people, primarily on the Cheyenne Indian Reservation, who would be without water.

There is a study that's underway by the Corps right now, which I understand will be completed in the next few weeks, which will lay out some of the options and some of the costs associated with that. But I wanted once again to emphasize and to reiterate the importance of this issue, and for your attention. I just think that we can't afford to wait until that crisis occurs. Because the ability to respond in a short period of time, it may not be possible to re-

spond in a short period of time. I think the more planning we do ahead of time right now, the better off we are all going to be.

But I wanted to say that to you, to reinforce the importance of that issue and also perhaps to maybe get your comment with respect to some of the things that the Corps is now doing in anticipation of what we could experience this summer, assuming that we don't get some rainfall in the upper basin States. Water supply, potable water for the people in the Cheyenne Indian Reservation and many of the communities surrounding it, about 14,000 people would be extremely adversely impacted if that should happen.

So we expect to work closely with you, but I would be interested again in just perhaps your observations at this point in time about how things are progressing.

Mr. WOODLEY. Yes, Senator, we have also spoken to Colonel Beattie and his higher commander, General Grisoli, who is here with us today in another capacity. So he also has reinforced this as well, I know, and General Riley in the same way. Colonel Beattie, we expect Colonel Beattie to be in real time contact with this problem, not to hear about it from when he gets a call, but to have him and his experts from Omaha in real time contact with this, on a daily basis, to understand that what is happening with the levels in relationship to this particular intake and to the other intakes, and what options there are and what the costs will be, and how the Corps of Engineers can participate in making sure that there's no interruption of the water supply necessary for human health and well-being on that reservation.

Having said that, I have also told him that we need to look at the horizon. I think that the one thing that I have been most disappointed in, in the situation that I found, was the inadequate master plans for the major reservoir facilities. They have not been updated and to the extent they existed, they were not adequate. Beyond that, they had not been brought up to date.

My instruction has been that we are not, we should not be responsible for finding ourselves in a situation where a basin for which we have some decades of data now, and which was known to Lewis and Clark to be prone to drought, we should not now be staring at each other in gap-mouthed astonishment to find that we're having a drought in the region. Instead, we should know when the level of the reservoirs reach certain points that actions must be taken, and that those actions should be, whether it's something as simple as extending a boat ramp, or something as complex as maintaining the necessary intakes for potable water.

So I will expect to see, within at least the next year or the year after that, with respect to each of these facilities, a fully and comprehensive and fully coordinated master plan so that my successor who deals with the drought of 2025, so he or she will know what it is that needs to be done.

Senator THUNE. I know it wasn't the Corps which was responsible for the construction of that intake initially, but I know that General Grisoli and General Riley are also acquainted with this issue. But people look to you as sort of the custodians, if you will, of that system, and to be the lead on any response. So I know there are a multitude of agencies involved with that, and Colonel Beattie

has tried to explain to me what they are doing in trying to coordinate between agencies the various lines of responsibility.

But all I want to reiterate is the dire emergency this will present if in August that pool level reaches a point where that intake is no longer able to provide water for the 14,000 people that are affected by it. We are anxiously looking forward to working with you in terms of what you need from Congress to address that.

But clearly, there are several agencies I know that have some jurisdiction there. But I appreciate the fact that the Corps has stepped up and is working to at least proactively address what could be a very, very dire situation for the people in that area.

Mr. WOODLEY. Senator, we are always, I am, I and General Grisoli, at whatever level you and your staff want, if there is something that needs to be done and is not being done, I would commit to you to do everything within my power to remedy that whenever it is brought to my attention.

Senator THUNE. We will look for it. The study should be completed soon. It will lay out a series of options, so we'll go from there. Thank you.

Senator INHOFE. Thank you, Senator Thune. The Chair will ask unanimous consent that the testimony of Michael Butler be included into the record. It is the intent of the Chair to report him out with the rest of the nominees, that's for the Udall Foundation.

[The referenced document follows on page 158.]

Senator INHOFE. It is also is our intention to have a business meeting a week from today where I will report out the nominees and also the WRDA bill.

Senator Clinton, you've been very patient. We're having 5-minute rounds. Feel free to take more time if you desire.

Senator CLINTON. Thank you very much, Mr. Chairman.

Gentlemen, thank all of you and thank you for your service.

Mr. Woodley, I have a longstanding interest in the Corps' ongoing study of the St. Lawrence Seaway. It's my view, shared by many who have looked at this, that expansion of the seaway would cause irreparable damage to the St. Lawrence River, would cost taxpayers literally billions and billions of dollars and provide little in the way of additional economic benefits. That's why I was pleased when the Corps committed that the current phase of the study would not look at expanding the seaway but instead would focus on maintaining and optimizing the current seaway system.

However, the study has since evolved from a U.S. Army Corps of Engineers reconnaissance study into a bi-national evaluation of the existing navigation system. That occurred in May 2003 when the U.S. Department of Transportation signed a memorandum of cooperation with Canada's Ministry of Transportation. This has understandably led to some confusion, because we have always viewed the Corps as the principal agency and the responsible agency.

So there is a great deal of concern in the Great Lakes-St. Lawrence region about the scope of the study. As a result, I sent a letter to Congress, to the Corps on January 24, along with 13 other Members of Congress, asking for detailed information about the scope and time line of the study. I mention this because to date we have not received a reply from the Corps.

However, I understand from my staff that the Corps may soon be ready to provide the information requested within the next week or two. Can you confirm that I and other Members of Congress will soon receive this important information clarifying the status of the St. Lawrence Seaway study?

Mr. WOODLEY. Senator, I'm delighted to understand that they don't respond to you any better than they do to me.

[Laughter.]

Mr. WOODLEY. Having said that, I am also informed by the staff of the Corps of Engineers that the letter has been held up by the necessary inter-agency coordination, so that all, the Transportation Department and the Corps of Engineers, and the FAA and for all I know the CCC has approved it and that they can all agree that this is the correct information that you and the other Senators are receiving. I believe that within the week you will receive your information.

Senator CLINTON. Thank you very much, Mr. Woodley. I appreciate that. I must say that the Corps has been very responsive on this issue.

With respect to another important Corps responsibility, for the last 30 years, the Corps has conducted one of the most extensive, comprehensive studies of coastline erosion in the world, I think. This is the Fire Island to Montauk Point Reformulation Study. Anyone who is familiar with that part of the shoreline of Long Island, you know that it is one of the most beautiful beaches in the world, but it is battered daily by the ocean and it has suffered a lot of erosion. Of course, because of the growing population, a lot of development challenges as well.

Last year, we in New York received a commitment from the Corps that funding for the completion of this study, which is literally in its last year after 30 years of effort, we are about to get what I believe, Mr. Chairman, will be state-of-the-art information about what erosion occurs, why it occurs, how to prevent it, how to save beach frontage from further losses, so that we can continue to utilize it for recreational, commercial and other purposes. Unfortunately, we discovered it was zeroed out in the President's budget. I would like to work with you, it's a relatively small item, but it's one that would be necessary in order to finish this study, to have the information.

At that point, then, the State and local governments, along with private landholders, along with the Federal Government, will have a plan. Right now, nobody knows what they are supposed to do. They are not sure whether if they put a jetty out there or if they build too close—they don't know what to do. Everybody has been waiting for the completion of this very comprehensive study.

So I would like to work with you, Mr. Woodley, to try and make sure we finish this study, so that then the State's responsibility and local government, everybody else's, can be clear. But it will be done within the context of a comprehensive, scientific study that the Corps has carried out.

Mr. WOODLEY. I will certainly be delighted to look into that, Senator, and work with you to reach a conclusion on that.

Senator CLINTON. Thank you very much. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Clinton.

Mr. Woodley, I would just like to make a couple of comments. First of all, the worst of all Superfund sites, Tar Creek, your cooperation and the cooperation of the Corps has been very good, as well as all the other agencies. We now have a plan that is working, we're on schedule. It involves the State of Oklahoma, University of Oklahoma, the Corps of Engineers, the EPA, DOI and everybody else, and they are all talking to each other.

So everything is good and I feel good about it. I just want your commitment that you will continue having that as your top priority, as you have in the past.

Mr. WOODLEY. Yes, sir.

Senator INHOFE. Then second, back when we had the Everglades Restoration Act of 2000, I opposed that at the time, and I did so because we did not have—that was the first time that legislation has been passed without a Corps report. The legislation provided that we would get a report every 2 years, assessing certain things. As of now, we haven't gotten anything, and this is 5 years later. So I just wanted you to tell us right now what date we can expect to have that first report.

Mr. WOODLEY. Senator, I'm aware of a 5-year report that's due. But I would have to look into that and find out what the 2-year report is. I know we are preparing a 5-year report.

Senator INHOFE. Yes, you have two different reports. One was having to do with the independent scientific review panel, and the other was a panel to produce a report to Congress every 2 years assessing with measurable ecological indicators the Agency's progress in restoring the Everglades.

Now, that's the biannual report. You might ask your staff here to join in and see if everyone is also unaware of that.

Mr. WOODLEY. I am not aware of it, no, sir.

Senator INHOFE. OK, it's in the statute. Well, why don't you become aware of it and then for the record, respond to it so we know when we are going to receive that.

Mr. WOODLEY. It's one of our lengthier statutes.

Senator INHOFE. All right, very good. We appreciate your time today. You all have done an excellent job and we are looking forward to working with you. We will dismiss panel No. 2.

Anything else? OK, we're adjourned.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

[Additional statements submitted for the record follow:]

#### STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. Chairman, thank you for holding this hearing to consider the nomination of D. Michael Rappoport for reappointment to the Udall Foundation Board of Trustees. I am pleased to offer my highest recommendation for his confirmation.

The Morris K. Udall Foundation was established by Congress in 1992 to honor the legacy of Mo Udall and his commitment to the preservation of the nation's natural environment by advancing programs in environmental and Native American policy. The Foundation has enjoyed great success. It has competitively awarded hundreds of scholarships to college students throughout the United States; it has developed and carried out a very successful native American Indian Summer Congressional Internship Program; and, it is well along in the effort to establish the Native Nations Institute that was authorized by Congress in 2000 to provide leadership and governance training for tribal officials.

The Udall Foundation has also established and successfully operated the U.S. Institute for Environmental Conflict Resolution, created to assist in the resolution of

federal environmental, natural resources, and public lands conflicts and controversies through facilitated negotiation, mediation, and collaborative problem-solving. It is so appropriate that the Conflict Resolution Institute is housed under the Morris K. Udall umbrella, as Mo was so adept at helping find common ground to forge resolutions from often diverse view points resolutions that were of benefit not only to Arizona, but the nation.

The Act establishing the Foundation created a Board of Trustees comprised of 13 members, almost all of whom are nominated by the President and confirmed by the Senate. Mr. Rappoport was first confirmed in 1994 as one of the original members of the Board, and was reappointed in 1997 to serve a term that expired in October 2002. Mr. Rappoport was again nominated by the President for reappointment last year. Unfortunately, the full Senate did not have an opportunity to consider his nomination before adjournment.

Throughout Mr. Rappoport's service on the Foundation Board, he has played a critical role in the Foundation's many achievements. He is currently serving as the Chair of the Management Committee and has worked tirelessly to help ensure the financial integrity and operational success of the Foundation. It is essential that this highly dedicated individual be reappointed to the Board to help ensure the Foundation's future and further build upon its many successes to date.

Mr. Chairman and members of the Committee, Mr. Rappoport's contributions to the Foundation have been remarkable, and I am pleased to strongly recommend his swift confirmation for reappointment to the Morris K. Udall Foundation Board of Trustees.

Thank you.

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STATEMENT OF STEPHEN L. JOHNSON, NOMINATED BY THE PRESIDENT TO BE THE  
ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. Chairman and distinguished Members of the Committee, I am honored to appear before you today as the President's nominee for the position of Administrator of the United States Environmental Protection Agency. I want to thank Chairman Inhofe and Ranking Member Jeffords for scheduling this hearing this morning, and I also want to thank many of you for the courtesy of meeting with me in the past several weeks to discuss my qualifications for this position.

Mr. Chairman, I am enormously indebted to President Bush for the opportunity he has given me. I have had the privilege of serving in the EPA for more than twenty-four years, and during this time I have had the opportunity to participate in many of the Agency's most significant accomplishments. I have worked with eight of the nine EPA Administrators, and I understand first-hand the enormous responsibility the Administrator of the EPA has to protect human health and the environment. That sense of responsibility is heightened by being the first career employee and the first individual with formal scientific training to be nominated to head the Agency.

Mr. Chairman, as you are aware, I am trained in biology and pathology. After graduating from college, I worked for the Computer Sciences Corporation at the Goddard Space Flight Center and was assigned to serve as a junior member of the launch support team for the first Synchronous Meteorological Satellite (SMS-1). After completing my graduate degree in pathology, I worked at Litton Bionetics, Incorporated, as a research scientist. I began my career at EPA in 1979 as a health scientist in the Office of Pesticides and Toxic Substances. I joined Hazelton Laboratories in 1982 to be Director of Operations, where I managed the company's laboratory operations, including the toxicological evaluation of chemicals. In 1984, I returned to EPA to the Office of Prevention, Pesticides and Toxic Substances (OPPTS), where I held numerous positions, including the Director of the Registration Division, the Deputy Director of the Hazard Evaluation Division, and the Executive Secretary of the Scientific Advisory Panel for the Federal Insecticide, Fungicide, and Rodenticide Act. I also served as the Deputy Director of the Office of Pesticide Programs, and the Principal Deputy Assistant Administrator of OPPTS.

In 2001, I was honored to be chosen by President Bush—and confirmed by the Senate—to serve as Assistant Administrator for the Office of Prevention, Pesticides and Toxic Substances. In this position, I was responsible for implementation of the nation's laws for pesticides, toxic chemicals, right-to-know, pollution prevention, and lead-based paint, including the regulatory and scientific programs.

I was honored again in 2004 to be selected to serve as Deputy Administrator. I appreciated the support of this Committee and the full Senate in being confirmed, and I especially appreciated the support of both Governor Whitman and Governor—now Secretary Leavitt as I served under their leadership.

Mr. Chairman, during my more than two decades at the EPA, I have been privileged to direct, guide, and witness many significant environmental accomplishments in reducing pollution of the air, water, and land. Preparing for this hearing has helped to remind me of the significant accomplishments we have achieved. For example, today the air is the cleanest in three decades. Over the last thirty years, total emissions of the six principal air pollutants have decreased by more than 50 percent, while the Gross Domestic Product has increased by more than 175 percent. EPA's recent Clean Air Interstate Rule, the Clean Air Mercury Rule, and the Clean Air Diesel Rule, will ensure that we continue—and even accelerate—our steady march toward achieving the goals of the Clean Air Act. I understand that we have more work to do. When he nominated me, the President charged me with working with Congress to pass Clear Skies legislation. Clear Skies legislation will improve upon EPA's regulations by creating a nationwide program with greater certainty and greater emissions reductions. I appreciate the work the Committee has already done on this issue, and I look forward to working with you to advance this important legislative initiative.

We have a number of other accomplishments to be proud of. In the 1970's, nearly 90 percent of children in the United States had blood lead levels above 10 micrograms per deciliter compared to just 2.2 percent today. Over the past several years, more than 1,000 contaminated sites are in the process of being cleaned up. Brownfields legislation passed by Congress and signed by President Bush in 2002 holds the promise to transform thousands of additional sites across the country into usable, productive land. Recycling and composting of municipal solid waste has increased more than tenfold in the last decade. And even as our economy has continued to grow, industrial releases of 332 chemicals tracked since 1988 are down nearly 50 percent, a reduction of 1.55 billion pounds.

EPA and our partners continue to make progress in improving our beach water quality. Just a few months ago, former Administrator Leavitt put into place new beach water quality standards protecting the public against pathogens in coastal and Great Lakes waters. Annual wetland losses have dropped dramatically, and President Bush has now raised the bar by pledging to achieve, for the first time, an overall increase in wetlands. Who would have thought this possible thirty years ago, when wetland losses were nearly 500,000 acres annually? And our drinking water is cleaner and safer, too. Over 90 percent of the population served by community water systems receives drinking water that meets all health-based standards—up from 79 percent just a decade ago.

Our food supply is also safer. EPA has been increasing protections from pesticides for everyone—and especially children—through its vigorous implementation of the landmark 1996 Food Quality Protection Act (FQPA). EPA has reassessed nearly 70 percent of the existing pesticides to make sure they meet today's standards for safety. As a result, many pesticide uses that posed the greatest risks have been taken off the market. And many older pesticides have been further regulated to make sure that produce sold on the market does not have pesticide concentrations beyond acceptable limits, and that any pesticide residues in food meet the tougher health standards called for in the FQPA. Another example of the success of this effort to reassess pesticides is the greatly reduced use in residential settings of organophosphates—a class of acutely toxic pesticides. It's estimated that 15 million to 20 million pounds of organophosphate pesticides have been removed from use in and around homes. At the same time, we've worked to ensure that growers and citizens have the products they need to control pests.

Mr. Chairman, while serving in various positions within the Agency, I have relied upon several principles to guide my decisions. Even as we face new challenges, I believe that these are the principles I would rely upon as Administrator, and I'd like to summarize them briefly. First, I will continue to work to ensure that the Agency's decisions are based on the best available scientific information, and that the Agency uses the resources provided by Congress—and those resources we can leverage from other sources—to pursue scientific questions that are important to the health and welfare of the American public. The scientific community continues to make dramatic progress in understanding the effects of pollution on human health and the environment, and how to measure those effects. We see extraordinary advances in disciplines that barely existed ten years ago—in the fields of biotechnology, nanotechnology, and toxicogenomics.

As a scientist, I am intrigued with the promise that these new areas of discovery hold for improving the world we live in. But I also recognize that the process of scientific discovery is not always straightforward; there are times when we're not sure what the science is telling us. So our challenge is to make sure that when we are required to make regulatory or policy decisions, we are using the best available sci-



entific information, and at the same time we should continue to pursue and encourage rigorous scientific inquiry.

The second principle I will follow is to pursue as open and transparent a decision making process as possible. During my time at EPA, I have managed virtually every aspect of the Agency's rulemaking process, from the development of technical scientific papers, to the final, formal decisions. I understand that the credibility of EPA's decisions comes from two things: first, from the integrity of the science that underlies the decision; and second, from the ability of the public to understand how the Agency came to its decision. The ideal rulemaking process would be one in which we solicit input and advice from all interested stakeholders and then make a decision with which everyone agrees. Unfortunately, it rarely happens that way. Even when there is disagreement on the Agency's final decision, I want to be certain that the Agency has a clear rationale for that decision, and that rationale is evident to all who may be interested.

As a part of this effort to improve the openness of our rulemaking process, I will work hard to strengthen and improve the dialogue among government, the regulated community, public interest groups, and the general public. Furthermore, I recognize the important interest that Congress has in our work—both as the author of laws given to the Agency to implement, and as the overseer of taxpayers' dollars charged to EPA's trust—and I will do my best to accomplish your intent.

The third principle I will follow is that new problems require new approaches to finding solutions. Despite our past successes, we face many continuing challenges, such as limited resources, and a number of new challenges, such as environmental issues that cross traditional borders and boundaries. Just as we live in a global marketplace, many of our environmental problems are becoming increasingly international. These international issues require us to adopt new approaches. The President's Methane-to-Markets program is one such approach. This program is a new global initiative designed to advance international cooperation on the recovery and use of methane as a valuable clean energy source. In addition to the United States, thirteen countries are participating in the partnership and are expected to undertake activities aimed at capturing and using methane emitted from landfills, coal mines, and oil and gas systems. This program has the potential to reduce net methane emissions by up to 50 million metric tons of carbon equivalent annually by 2015, and continue at that level, or higher, in the future. This would be the carbon equivalent of removing 33 million cars from the roads for one year or eliminating emissions from fifty 500-megawatt coal-fired power plants.

I am encouraged that we have already had some success with a new focus on collaboration to address environmental problems—a method that is useful even when resources are limited and when typical legal authorities are not available. Perhaps the best recent example of collaboration is the success we have enjoyed to date with the President's Great Lakes Executive Order issued a little more than a year ago. At the President's direction, former Administrator Mike Leavitt convened a meeting of governors, mayors, tribal leaders, other elected officials, the leadership of ten Federal agencies, and many, many stakeholders to convene a Collaboration of National Significance on the Great Lakes. These leaders are working together—across jurisdictional lines and across political boundaries—to develop a plan to preserve and protect the Great Lakes as a national treasure. I am excited about the prospect of adopting this model of problem solving to a number of other issues confronting the Agency in the next several years.

I should point out that the collaborative approach to environmental problem solving is not new. EPA's ENERGY STAR program is one example of a voluntary program that has existed for several years and has resulted in significant environmental benefits. ENERGY STAR is a voluntary public/private partnership that works with manufacturers, utilities, retailers, and end users to promote energy efficiency. Last year alone, using ENERGY STAR products and programs, Americans saved enough energy to power 24 million homes and reduce greenhouse gas emissions equal to 20 million cars—all while saving approximately \$10 billion on energy bills.

One key to the success of EPA's collaborative problem solving is to strengthen the partnership with our State and local colleagues. While EPA is obligated to continue to establish national standards and hold States accountable for meeting those standards, we know that each State and locality has its own unique issues, and that State officials are in the best position to know how to solve those issues. Through collaboration, we have the opportunity to provide States and localities with the most flexibility to address their specific problems, thereby getting the most benefit from limited resources.

Of course, none of these new tools is intended to take the place of EPA's obligation to enforce the environmental laws as written by Congress. We will use incentives

whenever it is appropriate, but we will never give up the ability to hold individuals accountable under the environmental laws of the nation. We have been entrusted with this important responsibility, and while we should not abuse it, we must always be vigilant to enforce the laws.

Finally, let me mention a fourth principle I consider vital to the Agency's future success. As a twenty-four year veteran of the Agency, I want to do what I can to build the Agency for the next generation and beyond, including strengthening the day-to-day operations of the Agency such as grants oversight, and ensuring that we meet our new responsibilities with respect to homeland security. As many of you know, we are facing a challenge as the professionals who joined the Agency in its infancy are retiring. EPA's success is inseparable from the qualifications of its staff. And the successes the Agency has accomplished are a tribute to the accomplishments of its staff. To maintain our ability to deal with the environmental challenges of the next decade and the next generation, we need to make sure we have people trained in the right disciplines and with the right problem-solving skills. I would say parenthetically that we have already started to train senior managers in collaborative problem solving skills, and we are starting to see the benefits of that training.

Mr. Chairman, I have dedicated my entire professional life to protecting public health and the environment. I have not viewed it to be a goal exclusive of maintaining our economic competitiveness, and I am proud that our nation continues to prosper as we continue to achieve our environmental objectives. If confirmed, I will do everything I can as Administrator to continue to serve the American people by working to protect their health and the health of the environment.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR INHOFE

*Question 1.* On February 1, 2005, I wrote you concerning an EPA grant (X-98165501, and subsequent amendment) to the Northeast States for Coordinated Air Use Management (NESAUM) totaling \$1,279,928.00. At least part of this grant, reportedly \$270,000.00, was subcontracted to the Risk Analysis Center at Harvard University where an EPA employee on leave pursuing a doctorate at Harvard prepared a report for NESAUM to undermine the mercury rule. How will you provide tighter controls over your agency to prevent bureaucrats within your agency from using taxpayer dollars to pursue their own agendas?

Response. Harvard University was paid approximately \$100,000 by NESAUM as a contractor under the EPA grant, in which the agency provided approximately \$270,000 to NESAUM for research related to the quantification of benefits from reducing mercury emissions. The EPA employee who worked for Harvard, however, did not receive any compensation for his work from EPA grant funds. Although the employee in question did receive approval from his Deputy Ethics Official (DEO) for this work, EPA is considering developing new guidance for DEOs to follow when an employee requests approval for outside employment, with or without compensation, involving EPA grant recipients. EPA is also planning to implement a system that would enable the agency to track approvals and disapprovals of requests for outside employment related to EPA grants.

*Question 2.* I strongly believe that real reform of grants management at the EPA requires the oversight from highest levels within the Agency. Can I get your commitment to ensure competition, ensure measurable environmental results, and ensure strict financial oversight especially of non-profit grant recipients with affiliated lobbying and political organizations?

Response. I share your commitment to a strong program of grant competition, to awarding grants that are results-oriented, and to ensuring that EPA provides financial oversight of all of its grants, including grants to non-profit organizations with affiliated lobbying and political organizations. The Agency has moved aggressively under its Grants Management Plan to address these issues. We are implementing a revised competition policy that lowers the competition threshold from \$75,000 to \$15,000, a change we estimate will subject an additional \$8 million to competition. We are also implementing a new policy on grant environmental results that will better align grants with the Agency's strategic plan and focus on outcomes. Further, on March 31, the Agency began imposing pre-award controls on non-profit applicants designed to identify problems in their ability to manage Federal grant funds properly and to prohibit grant awards until the problems have been resolved. As a supplement to these policies, and to enhance senior-level oversight, I recently issued a directive to EPA's Assistant Administrators and Regional Administrators requiring them to certify the appropriateness of proposed non-competitive, discretionary

grants and competitive announcements. I believe that these actions, coupled with other initiatives EPA is taking under its Grants Management Plan, will lead to genuine reform in our management of grants.

*Question 3.* I appreciate the EPA's work in the Tar Creek Superfund Site and would like to especially commend the work of Richard Greene and the staff at Region 6 and the new cooperative work among the EPA, Army Corps of Engineers, and Department of Interior which is necessary to clean up Tar Creek. Can I get your commitment that the RIFS (Remedial Investigation and Feasibility Study) and proposed plan for chat removal will be completed on schedule?

Response. The Tar Creek Superfund site remains one of EPA's top priorities. Yes, EPA will continue to work diligently on completing the Remedial Investigation and Feasibility Study (RIFS) on schedule. The Agency has made significant progress since the work on the RIFS started in January, 2004. Additional site sampling is underway and it is expected that the RIFS written report will begin this summer which will continue EPA on its schedule to develop the proposed cleanup plan.

*Question 4.* The Agency is currently reviewing the Spill Prevention Control and Countermeasure rule it published on July 17, 2002 to see if changes need to be made to assist small facilities. In a Notice of Data Availability published on September 20, 2004, the Agency published a proposal by the Small Business Administration that suggested a tiered approach for small facilities that would increase requirements as the amount of oil stored increased. The levels proposed by the SBA are too low to help marginal wells in my state of Oklahoma. These wells are the "small facilities" of the oil industry and their concerns need to be accommodated in any future rule making.

Can I get an assurance that as Administrator you will ensure that any new proposed rule or guidance fully addresses the concerns raised by the small independent producers with respect to marginal wells and the burdens placed on them by the underlying proposal?

Response. EPA is in the midst of a rulemaking process which includes collecting and analyzing data as follow-up to the September 20, 2004 Notice of Data Availability (NODA) for facilities that store oil below a certain threshold. All information, including that provided in comments on the NODA, will be weighed in formulating a proposed rule to address the concerns of smaller facilities in the context of an adequate and reasonable spill prevention, control and countermeasure program.

EPA will fully consider the concerns raised by the small independent producers and continue to work with them to understand their concerns and explore means to address them while retaining effective spill prevention measures at oil production facilities.

*Question 5.* As a scientist by training and as former AA to the Office of Prevention, Pesticides, and Toxic Substances (OPPTS, pesticide registration), you have a great deal of experience with the risk assessment process at EPA. As you are aware, there is a growing concern about the quality of the science at EPA, as well as the perception that the process is biased by both internal as well as external pressure requiring constant oversight from external entities. Take for example the unanimous rebuke by the National Academy of Science panel of EPA's risk assessment work with respect to perchlorate. There is also a concern about the lack of transparency to the public. If you are confirmed as EPA Administrator, what steps will you take to ensure that risk assessments and the policy decisions that flow from them are based on independently peer-reviewed science, absent external and internal pressure and what will you do to ensure that the information is adequately and understandably related to the public?

Response. I am committed to improving the use of science at EPA. EPA's process for risk assessments is very rigorous, using only information from the published peer-reviewed scientific literature. Nevertheless, there are instances, as in the case of NAS's perchlorate review, where the selection of studies and interpretation of studies differs among scientists, leading to different conclusions.

During the past year EPA's Office of Research and Development has instituted several steps to improve the transparency of its risk assessment process. As part of EPA's Integrated Risk Information System (IRIS) program, we currently publish a public call for nominations for chemicals to be assessed. When a selection is made we ask for new scientific information available or soon to be available about the chemicals nominated. We also publish an annual list of chemicals that are being assessed in order to inform all interested parties. When an assessment is ready to be peer-reviewed, we post the draft report as well as any comments that we receive from any member of the public on the IRIS web site. Finally, when an assessment is complete, the final assessment is also posted on the IRIS web site.

Recently, I have asked the IRIS program to modify their process to allow additional transparency and access to EPA assessments in progress. We will shortly be proposing this revised approach for public comment. We have received very favorable responses to our proposal from discussions with the American Chemistry Council and the White House Office of Science and Technology Policy.

All of EPA's IRIS assessments are peer-reviewed by independent panels of scientists, the EPA Science Advisory Board or the National Academy of Sciences. The steps that we are now proposing will add to the transparency of our process. We have constantly set ourselves the goal of meeting the highest possible standard for the quality of the assessments, including objectivity and transparency, and I believe that we are meeting those goals.

*Question 6.* Many constituents have expressed concern that some EPA staff personnel are not well informed and often over-zealous when using the agency's investigation and enforcement powers. I have heard examples where some EPA field personnel may be following their own agenda rather than learning the necessary science and understanding the applicable rules, laws and policies. Outside influences often have to educate the EPA project manager about the facts, the science and the applicable standards. This lack of training and experience can be frustrating for the regulated entity and may, in some cases, lead to hostility on the part of the EPA staff.

Can this Committee count on your efforts to assure that field staff are properly trained and supervised to perform their duties with respect for other agencies and the regulated public?

Response. EPA is committed to ensuring that our field staff are well trained and conduct inspections in a highly professional manner. In 1988, the Agency implemented EPA Order 3500.1, Training and Development for Individuals Who Lead Compliance Inspections/Field Investigations (Order) (revised in 2002). This Order establishes consistent Agency-wide training for employees leading environmental compliance inspections/field investigations. It ensures that these employees have a working knowledge of regulatory requirements, inspection methodology and health and safety measures. Additionally, EPA hosts an annual EPA Inspector Workshop to focus on issues related to inspections across all media. Finally, EPA has published a series of Inspector Manuals which provide guidance on conducting inspections, and operates an EPA Inspector Website which includes inspector/inspection policies.

To help ensure that facilities have an opportunity to voice any concerns about inspectors, especially small businesses, EPA inspectors normally distribute a fact sheet which includes a discussion on commenting on federal enforcement actions and compliance activities. The fact sheet provides the phone number for the Small Business Ombudsman, and has information on the ten Regional Fairness Boards, which were established to receive comments from small businesses on enforcement and compliance activities. We would welcome the opportunity to determine if a problem existed in a specific case (or cases), and if so, to take steps to correct it.

*Question 7.* EPA issued in February a proposed rule for on the matter of whether or not an NPDES permit is needed for the application of pesticides under certain circumstances and in compliance with FIFRA requirements. This proposed rule appears to be a solid effort and consistent with longstanding Agency policy and the recent statements it has issued following the Talent and Forsgren cases in the 9th Circuit—pesticides used in compliance with FIFRA are beneficial products, not "chemical wastes" as that term is defined in the Clean Water Act, and their application is not subject to NPDES permitting.

I am concerned, though, that this proposed rule excludes from NPDES permitting only those circumstances where pesticides are applied, in compliance with FIFRA, directly into, over or near water—so-called aquatic uses and dealing with pests found in or near aquatic environments. Certainly, if pesticides applied in those aquatic circumstances are excluded from NPDES permitting (as is appropriate), should not pesticide uses that take place further from water also be excluded? Such uses almost by definition should result in less pesticide reaching water. I know that it is the Agency's longstanding operational approach not to require NPDES permits under these circumstances. Would it not be wise to extend this proposed rule to cover all pesticide uses applied in compliance with FIFRA, and limit the confusion and potential ill-informed litigation that will focus on these non-aquatic uses?

Response. I understand your concerns with the limited scope of the Environmental Protection Agency's (EPA) proposed rule regarding coverage under the Clean Water Act (CWA) of pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Let me assure you that EPA is working hard to ensure that the legal application of pesticides is not subject to litigation under the Clean Water Act.

The proposed rule published in the Federal Register on February 1, 2005, embodies the substance of an Interpretive Statement that was issued by EPA on January 25, 2005. The Interpretive Statement clarifies that applications of pesticides to or over, including near, waters of the U.S. do not require National Pollutant Discharge Elimination System (NPDES) permits if the pesticides are applied consistent with all relevant requirements under FIFRA. The Interpretive Statement also stated that “[i]t has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements.”

The comment period on the proposed rule closed on April 4, 2005. Several commenters shared your concern that the proposed regulatory language only addressed pesticides applied to, over and near waters. EPA will review and respond to all comments received and issue a final rule by October of this year.

EPA committed in the Federal Register to “continue to review the variety of other circumstances beyond [those] described above in which questions have been raised about whether applications of pesticides that enter waters of the U.S. are regulated under the CWA, including other applications over land areas that may drift over and into waters of the U.S.” Towards that end, EPA is considering additional options that would successfully engage interested external stakeholders to provide feedback to the Agency on outstanding issues regarding NPDES and pesticides.

In addition, we would be happy to meet with you or your staff at any time to discuss this issue.

*Question 8.* Mr. Johnson put together a most impressive and extraordinary coalition of environmentalists, farm commodity groups, the pesticide industry, farm workers and labor to support the Pesticide Registration Improvement Act, enacted in 2004. PRIA brings new funding stability to EPA’s Office of Pesticide Programs, improves predictability for approval times for registration of new products aimed at public health and agriculture, and provides the resources needed to complete tolerance reassessment and re-registration. Industry has agreed to pay more than \$200 million over 5 years. It is a win for industry, for public health, for the environment, and for EPA.

As a principal architect of PRIA, how will you ensure that the funding stability it provides will be preserved and the deadlines it incorporates will be met? Further, can you give us assurance that you will keep this coalition together and support reauthorization of PRIA? In the face of budget pressures, what process and policy changes do you support that will ensure that the Pesticide Program will be able to meet its registration and re-registration obligations?

Response. Thank you for acknowledging the success of the Pesticide Registration Improvement Act. The Agency recently celebrated the one-year anniversary of the effective date of the Pesticide Registration Improvement Act, and has many positive accomplishments to report. During that timeframe, the registrant community has paid over \$20 million in new pesticide registration service fees and nearly \$45 million in renewed pesticide registration maintenance fees. These resources have been utilized to enhance the appropriated funding of both the registration and re-registration programs and help to ensure that all deadlines under PRIA and the Food Quality Protection Act are being met.

One of the hallmarks of PRIA has been the continued collaboration between the Agency and all stakeholders on pesticide registration issues. Through the Process Improvement Workgroup, operating under the Pesticide Program Dialogue Committee, the Agency continues to engage stakeholders to identify and collaborate in areas in areas to improve the registration process. These efforts have already identified the need to improve guidance regarding labeling requirements for pesticides, and other work is underway. The Agency has also undertaken internal reviews of its evaluation procedures and found ways to reduce an application’s queuing time while maintaining high quality, scientifically sound review standards. These efficiencies and process improvements will help enable the Agency to meet its registration and re-registration obligations.

I look forward to continuing to work with the Administration, with Congress and the coalition to continue our successful collaboration for stable funding and program efficiencies being achieved by EPA’s Office of Pesticide Programs.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR BOND

*Question 1.* Which will produce a greater amount of air pollution reduction, and therefore benefit the environment more: (1) litigation against a few dozen individual power plants, or (2) legislation affecting over 1,100 power plants and mandating a

70 percent nationwide pollution cut from power plants? Please provide a comparison of the lbs. of pollution reduced as a result of NSR settlements and the estimated lbs. of pollution that would be reduced through passage of Clear Skies legislation.

Response. Aggregate emissions from the power sector under Clear Skies would be reduced by 70 percent beyond today's emission levels. Annual emissions of SO<sub>2</sub> would drop from 11 million tons in 2000 to 3 million tons upon full implementation of Clear Skies, and of NO<sub>x</sub> from 5 million tons in 2000 to 1.7 million tons upon full implementation. As demonstrated by the Acid Rain Program, Clear Skies will achieve emissions reductions that (1) are greater; (2) are more cost-effective; (3) are more certain to occur; (4) will likely be realized sooner; and (5) can be achieved at far lower cost to the government than NSR enforcement actions. We have learned that, among other things, a cap-and-trade approach generally results in emission controls being installed at the largest plants nation-wide. On the other hand, an enforcement approach is generally limited to plants at which NSR violations have occurred—and not necessarily the plants that are most cost-effective to control. Settlements may allow EPA and an individual company to focus on achieving the most cost-effective reductions available from that company. But by definition, a NSR-type approach cannot be as cost-effective as a broad cap-and-trade approach like Clear Skies.

*Question 2.* For more than a year, EPA has been considering whether to allow consumers to purchase wood treated with A-C-C, or Acid Copper Chromate. ACC is less expensive than anything currently on the market and has been used successfully in Europe for years. EPA formed a Scientific Advisory Panel (SAP) last year to look at ACC and it concluded that there was little health risk to consumers. While the SAP certainly laid out a clear roadmap for re-registration of A-C-C, the EPA has failed to take any action on the SAP's recommendations. Can you give me an estimate on when the EPA will finally resolve this issue and hopefully give consumers more choice and lower costs when it comes to wood preservatives?

Response. EPA's action on the pending ACC application is dependent on two critical pieces of data that have not yet been submitted by the registrant to EPA. As described more completely below, EPA is concerned about potential dermal exposures to hexavalent chromium from treatment of wood with the ACC treatment solution. Hexavalent chromium as surface residue on treated wood may cause sensitization in humans contacting the wood in residential settings. Moreover, these surface residues have the potential to persist as the conversion to the less toxic trivalent chromium species is temperature-dependent.

To address the outstanding concerns, the Agency has taken several steps. The Agency presented its scientific issues regarding dermal sensitization to its Scientific Advisory Panel (SAP) in May 2004. Among other recommendations in its July 2004 report, the SAP noted that exposure information was important to determine potential risks associated with contact to treated wood surfaces. Specifically, the SAP stated: "It is not important how much of a chemical is in the matrix but how much is leached out of it and available for exposure."

In response to the report, the Office of Pesticide Programs has analyzed the recommendations, presented its analysis to the Agency's Science Policy Council (SPC), and based on recommendations from both the SAP and SPC, revised its level of concern for hexavalent chromium in ACC-treated wood. We are now waiting for two critical studies that the Agency required of the registrant in a letter sent January 2004. One of these studies will provide information that specifically addresses the level of hexavalent chromium on the surface of ACC-treated wood, and the other study is to determine levels of exposure to workers at wood treatment facilities. Once these data are submitted, the Agency will be in a position to make a determination as to whether there is a risk of dermal sensitization from exposure to hexavalent chromium resulting from contact to treated wood.

In addition, an extensive study of the cancer risks posed by oral ingestion of hexavalent chromium is underway by the National Toxicology Program (NTP) and we expect those results in May 2005. Upon receiving this study and the two studies requested of the registrant noted above, the Agency will be able to determine whether the law's "reasonable certainty of no harm" safety standard, including infants and children's exposures, can be met, and thus, make its registration decision.

*Question 3.* A concern with A-C-C is the possibility of a dermal reaction such as a skin rash. Yet the scientists who made up the SAP found the actual level of concern for dermal exposure to be between 50 and 167 times less than where EPA suggested. How is EPA responding to this finding?

Response. When the Agency establishes a level of concern, it typically selects a single value from the studies available to it representing an exposure level at which no adverse effect is expected to occur. The Agency will apply uncertainty factors to

that level to ensure an adequate margin of safety for people who may be exposed to the chemical—in this case, hexavalent chromium. The number and magnitude of the uncertainty factors will depend on the completeness and quality of the underlying database for the chemical.

For hexavalent chromium, the Agency's Scientific Advisory Panel (SAP) recommended a range of values from 0.09 to 0.3  $\mu\text{g}/\text{cm}^2$ . EPA has considered both the SAP recommendation as well as the recommendation of the Agency's Science Policy Council on this point and has established a value of 0.009  $\mu\text{g}/\text{cm}^2$ .

The difference in the values suggested by the SAP and that chosen by the Agency is a result of the lack of exposure information available and the possibility of repeated exposures which could occur. When data are supplied by the registrant on the actual surface residue levels of hexavalent chromium on the treated wood and the time course necessary for conversion of the hexavalent form to the less toxic trivalent form, then the value chosen by the Agency could be further revised since the degree of uncertainty about the level of exposure will likely be reduced. The Agency has communicated the rationale for its current level of concern and the possibility to revise that level upon receipt and evaluation of the surface residue data to the registrant.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR VOINOVICH

*Question 1.* EPA's mercury rule has already been sued, and lawsuits on the Clean Air Interstate Rule will soon follow. Based on past lawsuits on EPA rules, how much do you expect this lawsuit to cost the federal government to defend and how long do you expect the rules to be delayed?

Response. Litigation can be costly and could potentially delay implementation of EPA regulations. The filing of a lawsuit does not automatically stay the effectiveness of our rules. Thus, CAMR is in effect now and will remain so unless EPA or the Court were to stay the rule. We have received an administrative petition to stay the rule, which we are currently evaluating. We expect several parties to request the D.C. Circuit to stay the rule pending resolution of their lawsuits. If EPA and the Court deny such petitions, the CAMR will not be delayed at all. If EPA or the Court were to grant the requests, CAMR could be delayed anywhere from 90 days up to the full time the case is in litigation.

*Question 2.* The President signed an Executive Order last year to coordinate Great Lakes activities and develop a restoration strategy. How do you plan to be involved with this initiative?

Response. I am the acting as the Chair of the Great Lakes Interagency Task Force (IATF), which is spearheading implementation of the Executive Order. I am also representing the federal agencies on the Executive Committee governing the Great Lakes Regional Collaboration (GLRC).

The first year of the Task Force has been spent working on high priority issues needing interagency cooperation such as the Interagency Snakehead response, the Illinois Sanitary and Ship Canal Dispersal Barrier and identifying future areas where interagency coordination would improve the delivery of programs and decision-making in the Great Lakes Basin. These projects, along with more than 130 other interagency initiatives, have been documented in an Interagency Project Matrix that is being updated and used as a tool to promote improved management of Great Lakes programs.

The GLRC that was launched toward in December 2004 involved considerable outreach and discussion with Great Lakes governmental partners at the State and local levels, Tribes, key Great Lakes organizations, and stakeholders. The GLRC is governed by an Executive Committee that is overseeing the effort to develop a strategic plan. I represent EPA and other Federal Agencies on the Executive Committee. The Committee has established eight "Strategy Teams" corresponding to priorities established by the Great Lakes governors and adopted by the Great Lakes mayors. Work of the Strategy Teams and the Executive Committee is currently underway and will culminate in "Summit I" during the Summer 2005, and "Summit II" in December 2005, at which time the final Strategic Plan will be released.

Continuing the work of the GLRC is a high priority. The plan will serve as a blueprint for the Great Lakes community, and will assist Federal Agencies in priority setting, as well as to identify areas where greater interagency coordination can help in cleaning up and protecting the Great Lakes. Continued bi-partisan support and leadership from Congress will be critical to our success.

*Question 3.* Over the last two Congresses, I have introduced legislation to create a position of Deputy Science Administrator at the EPA. What is your position on this bill? What role do you believe science should play in EPA's decision making? What steps will you take to continue to improve the science that EPA relies on?

Response. I appreciate your leadership in promoting improved science at EPA. Upon arriving at EPA, Administrator Whitman commissioned a task force to identify ways to strengthen the scientific and economic bases of our policies and decisions at EPA. The task force concurred with the need for an Agency Science Advisor, and Administrator Whitman appointed Paul Gilman, Assistant Administrator for Research and Development, to this position. I understand that the responsibilities of the Science Advisor and the proposed Deputy Science Administrator are similar. The Agency has found the Science Advisor position to be extremely valuable in advancing the use of science at EPA and I intend to fill the position as quickly as possible if confirmed.

While it is important that EPA's scientific research and development be integrated with and be responsive to the Agency's regulatory needs, it is vital that the conduct of the research itself be independent and of the highest quality. Over the past four years, EPA has taken major steps to assure that it carries out a program of sound science to inform Agency decisions without allowing regulatory objectives to distort scientific findings or analyses. These steps have included open, transparent and peer reviewed research planning; competitively awarded extramural research grants; independent peer review of science publications, assessments and documents; and rigorous peer review of EPA's research laboratories and centers.

The measures the Agency has taken in the past several years have gone a very long way toward strengthening science at EPA. We can always improve, but EPA has made many achievements to date in strengthening the Agency's science program.

EPA's Fiscal Year 2006 President's Budget reflects this Administration's commitment to ensuring that the nation's environmental policy is based on cutting-edge science. This budget includes investments for Homeland Security and advanced environmental monitoring, including support for the Global Earth Observation System of Systems (GEOSS). The results of these efforts will help provide the scientific foundation to protect human health and the environment for decades to come.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR CHAFEE

*Question 1a.* In November 2003, EPA released a draft blending policy for wastewater treatment facilities that would clarify the use of blending as an approved treatment process. This guidance has been praised by municipalities and the wastewater industry, and met by opposition from the environmental community. The environmental community has taken the position that this draft guidance would provide new loopholes for wastewater treatment plants to avoid needed upgrades at their facilities. On the other hand, the industry states the guidance clearly defines the situations in which blending would be allowed and includes specific guidance on how the policy should be implemented in order to meet Clean Water Act standards. How many facilities nationwide utilize blending as a management practice? Is this figure expected to increase under the new blending policy?

Response. Information is not available on the frequency of blending at the 16,000 municipal wastewater treatment facilities across the United States. The Association of Metropolitan Sewerage Agencies (AMSA) conducted a survey of its members in 2001. AMSA received 122 responses (47 percent of its membership). Of the members that responded, 48 percent (59 of 122 responses) indicated that they blended. The 59 utilities that indicated they blended had facilities in 26 States.

Given the lack of current data on the number of facilities that blend, the frequency of blending at the facilities and the scope of any final EPA blending policy, it is difficult to predict whether blending would increase. The management of wet weather flows within a municipal wastewater collection system and treatment plant is very site-specific and the potential for blending would depend on a number of variables, including: the management of peak flows in the collection system; peak wastewater flows at the treatment plant; available wastewater treatment plant capacity; and, the plant-specific permit limits.

*Question 1b.* Does EPA have a handle on the total number of blending events by all facilities nationwide on an annual basis?

Response. EPA does not have an estimate of the frequency of blending at municipal wastewater treatment facilities. EPA believes that its on-going review of the legal, policy and scientific issues associated with blending will significantly improve



regulatory oversight of discharges from municipal sewage treatment facilities during wet weather conditions. These improvements, along with improved data management, could make accurate estimates of blending events possible in the future.

*Question 1c.* Where does the agency currently stand on finalizing the blending policy?

Response. EPA continues to review comments. Our goal is to clarify permitting requirements relating to wet weather flows at municipal sewage treatment facilities. EPA's focus is on providing the public with protection from exposure to contaminants, including pathogens, and ensuring nationwide access to clean, safe and secure water. We have not established a schedule for making a final decision.

*Question 2.* The President's FY 2006 budget would eliminate nearly all \$2 million from EPA's Stratospheric Ozone Protection program. This program has been recognized as one of the most cost-effective with benefits outweighing costs by a 20:1 ratio. The proposed budget reduction prevents the U.S. in meeting its commitments under the Montreal Protocol for which it has provided two decades of consistent leadership in restoring the earth's ozone layer. I understand many industries such as manufacturers of refrigeration and air conditioning equipment, appliances, and automobiles, have invested billions in developing ozone safe technologies on the understanding that the U.S. government is serious about protecting the ozone layer. If the budget cut causes the U.S. to fail to comply with the terms of the Montreal Protocol, does this not risk stranding a huge investment in this country?

Response. The stratospheric ozone protection program has been very successful, with benefits significantly outweighing costs. After Congress completes the appropriations legislation, I will review the FY 2006 budget to ensure that the United States can continue to meet our commitments under the 1990 Clean Air Act Amendments and the Montreal Protocol and realize the benefits of the investments that have been made by U.S. industry.

*Question 3a.* As part of the approval process for the Cape Wind Energy project in Nantucket Sound, EPA's New England office recently submitted comments on the Corps of Engineers draft environmental impact statement. This project off the coast of Massachusetts will help the region meet our goals for renewable energy production and for air quality. Are you familiar with this project and the importance of moving forward with it?

Response. I am familiar with the Cape Wind proposal. It is the first and largest scale offshore wind energy project proposed in the United States, and I consider it to be among the highest priority projects now going through the environmental review process. Staff in my immediate office and in EPA's headquarters' program offices, in addition to those in EPA Region 1, have been and will continue to be involved in tracking the progress of the project and overseeing the agency's review of it. In view of the project's importance and precedent, it is essential that EPA and all of the agencies make sure that the environmental review process is sound and moves forward to completion.

*Question 3b.* If renewable energy is going to become a reality in this country, it is important that EPA uses its NEPA review authority to help make sure these projects are environmentally sound. However, if we set the standard of proof unrealistically high, the large scale use of renewable energy will remain an unattainable goal. Do you agree that EPA should be using its authorities to help make renewable energy a reality?

Response. EPA supports an increase in electrical generating capacity using renewable resources such as solar, hydropower, and wind. Every major project requiring federal permits, even those with potential for significant environmental benefits such as Cape Wind, are required by the National Environmental Policy Act to undergo a rigorous review that examines adverse impacts and alternatives. This is especially important when a project is the first of its kind in the U.S. because how the analysis is done sets a precedent for future reviews. EPA has devoted substantial effort to working as a cooperating agency with the Corps of Engineers during development of the environmental impact statement. In comments on the EIS, EPA stated strong support for renewable energy and did not oppose the Cape Wind project, but concluded that the document did not contain enough information to adequately assess the project's potentially adverse impacts and alternatives to avoid or minimize those impacts. The concerns EPA raised were not new and had been raised by EPA and other agencies during development of the EIS. EPA had hoped the EIS would address the concerns because New England needs clean, renewable energy projects, and Cape Wind's proposal, if shown not to cause significant adverse impacts, has tremendous potential for benefiting the region.

*Question 3c.* Will you promise to review this matter personally to make sure that EPA is being constructive and helpful in moving this project forward?

Response. Yes. I will make sure that EPA continues to treat this project as among the highest priorities and makes diligent, constructive efforts to work with the Corps of Engineers to completion of the environmental review process. Since commenting on the draft environmental impact statement, EPA Region 1 has contacted and met with the Corps to discuss their interest in working toward resolving any issues and moving the environmental review forward expeditiously.

*Question 4.* In Rhode Island, approximately 250 sites meet the criteria for brownfields; one of these is the Fields Point Site. Although progress has been made, the application process has stalled. I believe that it is necessary to take a property, like Fields Point, that has sat vacant for decades, on a beautiful shoreline and revitalizing it for community use. My question is, how do you see the EPA brownfield grant program continuing or evolving under your stewardship?

Response. I will continue to vigorously implement the 2002 Brownfields Law. Interest in EPA Brownfields grants remains high, as demonstrated by the more than 500 applications for the more than 200 grants that EPA anticipates awarding in fiscal year 2005. EPA will continue to emphasize outreach to state and local governments, non-profit organizations and the private sector, and focus on improving performance measures, working with state, tribal and local grantees.

The Fields Point area is an example of how partnerships can cleanup and revitalize brownfields properties. A portion of the area was assessed with \$150,000 from EPA. Cleanup was undertaken using a \$700,000 loan from the State of Rhode Island using an EPA Revolving Loan Fund grant. An environmental education center is now under construction. In another area of Fields Point, the university owning the property has assessed the site and applied to EPA for additional cleanup assistance. That application is under review and EPA anticipates announcing the fiscal year 2005 grants later this spring.

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RESPONSE OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTION FROM  
SENATOR MURKOWSKI

*Question 1.* EPA's Clean Air Mercury Rule represents a significant step in improving America's air quality. This rule makes the United States the first country in the world to regulate mercury emissions from utilities. I hope other nations will follow the Administration's lead. I understand from EPA's analysis that humans are primarily exposed to mercury by eating fish that contains methylmercury. I also understand the primary source of mercury, especially for the fish most commonly found in the marketplace, is from overseas sources, not those in the United States. As you know, the seafood industry is very important to my State and we don't want seafood harvested in Alaska's nearly pristine environment to be affected by pollution from abroad. What is EPA's position on seafood consumption? Would you please remind us which four species of fish pregnant women and children should avoid eating? And would you please give us examples of fish with low mercury levels?

Response. The Clean Air Mercury Rule is an important component of EPA's plan to improve the Nation's air quality. I join you in hoping that other nations will follow our lead and reduce mercury emissions from utilities and other sources.

EPA continues to recognize that fish and shellfish are part of a well-balanced diet that can contribute to heart health and children's proper growth and development.

Nearly all fish and shellfish contain traces of mercury. While not an issue for most Americans, some fish may contain higher levels that might harm an unborn baby or young child's developing nervous system. The risks from mercury in fish and shellfish depend on the amount of fish and shellfish eaten and the levels of mercury in the fish and shellfish. As a result, the 2004 FDA/EPA Fish Consumption Advisory advises pregnant women, women who may become pregnant, nursing mothers, and young children to avoid certain types of fish that are higher in mercury—specifically shark, swordfish, tilefish and king mackerel. But seafood consumption generally is very beneficial and the advisory also recommends that this same group eat up to two meals per week of fish and shellfish that are low in mercury. Five of the most commonly eaten fish that are low in mercury are shrimp, canned light tuna, salmon, pollock (including Alaskan pollock), and catfish. In addition, Americans can check local advisories about the safety of fish caught by family and friends in local lakes, rivers, and coastal areas. If no advice is available on local sportfishing species, eat up to 6 ounces (one average meal) per week of fish caught from local waters, but don't consume any other fish during that week.

Americans can follow these same recommendations when feeding fish and shellfish to young children, but serve smaller portions.

*Question 2.* How should regulations recognize unique conditions, such as when an area is classified as “non-attainment,” but the fact of non-attainment is due to uncontrollable environmental conditions, such as severe cold-weather temperature inversions (as in Fairbanks, Alaska).

Response. EPA took several steps to help the Fairbanks area come into attainment with the carbon monoxide (CO) standard in light of the severe cold temperatures occurring in winter months when CO pollution is of greatest concern. For example, we provided the area with assistance in developing its attainment demonstration. This included help in determining the control measures the area would need to attain the standard and assistance with its air quality modeling. The steps taken by the state and local officials, in combination with national control programs, proved to be successful. In July 2004 EPA approved the Fairbanks maintenance plan and redesignated the area to attainment for CO.

With regard to your question about unique conditions, such as severe cold temperatures, here are policies EPA has put in place. Working with State and local governments, EPA has developed two policies (Exceptional Events Policy and Natural Events Policy) which describe the circumstances under which data affected by certain exceptional and natural events may be excluded from regulatory decisions such as attainment determinations. When either an exceptional or natural event is determined to have significantly contributed to a violation of a national ambient air quality standard (NAAQS), our policies and guidance have provided for special exemptions in the use of the data for regulatory purposes. However, EPA does not exempt violations of the health-based NAAQS that occur during uncontrollable environmental conditions such as severe cold-weather temperature inversions. The National Research Council (NRC) affirmed this position in a report entitled “Managing Carbon Monoxide Pollution in Meteorological and Topographical Problem Areas.” (Fairbanks, Alaska was one of the cities included in this report.) The NRC noted that granting an exemption to a health-based NAAQS denies protection to the general population and susceptible individuals. The NRC report supports EPA’s long-established policy that it is appropriate for air quality managers to consider meteorological and topographical issues when determining the emission reductions needed to achieve the NAAQS.

*Question 3.* Current science indicates the largest part of any industrial atmospheric contaminants present in Alaska are from overseas sources, both man-made and natural. How should regulatory action recognize and respond to that fact?

Response. EPA recognizes that some areas in the United States are affected by pollution transported from overseas. The Agency has policies to adjust its regulatory requirements for areas that can demonstrate the impact of such pollution. EPA is also working to reduce international transport through participation in international environmental negotiations and agreements.

In keeping with its Exceptional Events Policy (see question #2 above), EPA currently has a policy related to international events that may cause, or significantly contribute to, violations of the ozone standard at air quality monitoring sites within the United States. EPA is currently working to draft a policy that will address emissions from international events that will apply to all of the criteria pollutants. This policy will address the treatment of data determined to be affected by international events such as emissions from international forest fires, Sahara dust, glacial dust, as well as other types of emissions from international sources, both man-made and natural, that may impact monitoring sites within the United States.

Section 179B of the Clean Air Act (Act), related to international border areas, applies to nonattainment areas that are affected by emissions emanating from outside the United States. This section requires EPA to approve a State Implementation Plan (SIP) for a nonattainment area if: (1) it meets all of the requirements applicable under the Act, other than a requirement that the area demonstrate attainment and maintenance of the NAAQS by the applicable attainment date for the affected pollutant; and (2) the affected State demonstrates to EPA’s satisfaction that the SIP would be adequate to attain and maintain the NAAQS by the applicable attainment date “but for” emissions emanating from outside the United States. EPA also participates in numerous international agreements and cooperative working groups which are focused on reducing transported pollution. Prominent examples include the 1991 U.S. Canada Air Quality Agreement and the 1983 La Paz Agreement between the U.S. and Mexico.

EPA has also been an active participant in the Convention on Long-Range Transboundary Air Pollution (LRTAP), which establishes a broad framework throughout North American and European regions covered by the United Nations Economic Commission for Europe (UNECE) for cooperative action on air pollution. LRTAP sets up a process for negotiating concrete measures to control specific pollut-

ants through legally binding protocols; so far, LRTAP has addressed issues such as acid rain, ground-level ozone, persistent organic pollutants (POPs), and heavy metals. In 1999, the United States signed a protocol to abate ozone, acidification, and eutrophication. Just recently, EPA and LRTAP jointly formed a Task Force to conduct the technical analyses necessary to develop a fuller understanding of the hemispheric transport of air pollutants and provide technical assessments of this transport to LRTAP executive bodies for use in Convention Protocols. These efforts are all very important to reducing transported pollution.

*Question 4.* Dust control is a serious matter in Alaska and other western states. What role can EPA serve in assisting states find ways to control the problem, especially in isolated rural areas such as Alaska villages?

Response. Wind blown dust is a pervasive air pollution problem across parts of the West. The EPA assists the States in a number of ways as they search for technically viable and cost-effective solutions to dust problems. EPA is currently working closely with the Dust Forum convened by the Western Regional Air Partnership (WRAP) of the Western Governors' Association and also with the National Tribal Environmental Council and the Institute of Tribal Environmental Professionals (ITEP) on a number of technical issues related to dust source identification, emissions estimation and mitigation. For example, EPA has recently worked closely with the State of California to identify control measures that the State will require for adoption in specific areas, and with ITEP on the development of software to estimate emissions from dust and other sources. ITEP also has a grant from EPA to provide training to Alaskan Natives.

EPA has successfully worked with communities to develop solutions that are tailored to their specific needs and constraints. An example of a very successful effort occurred in the Owens Lake area in the Great Basin of California. Other projects are underway in the West that we are confident will be helpful to communities and citizens. Specifically, EPA has initiated grants with two Alaskan villages to monitor air quality and develop solutions to their dust problems. The State of Alaska has recently developed a brochure to help guide Alaskan Natives toward solutions to their road dust problems.

Also, one of the most effective ways the EPA can help is by providing the appropriate forums to identify technologies and share experiences and successes across State, local, and Tribal boundaries. Examples of this are the Best Available Control Measures workgroup, the annual Emission Inventory Conference (being held April 12–14, 2005 in Nevada) and periodic regional meetings with States, local governments and tribes.

*Question 5.* What role do you see—both for yourself or the agency—in reconciling contradictory science on the subject of climate change?

Response. As the Administrator of EPA, I will ensure that the agency remains fully committed to using an open, transparent, and scientifically rigorous process in evaluating the science of climate change. This means that EPA is committed to rigorous peer review of all its research and scientific finding, and to the active involvement of the scientific community (e.g., the National Research Council), interested stakeholders, and policy makers.

The planning and implementation of EPA's climate science activities is closely coordinated with the interagency U.S. Climate Change Science Program (CCSP). The CCSP coordinates and integrates scientific research on global change sponsored by 13 participating departments and agencies of the U.S. Government. Through the CCSP, the EPA develops and provides timely, useful and scientifically sound information to decision makers.

The CCSP is organized to reduce uncertainties in five areas:

1. Improve the knowledge of past and present climate conditions.
2. Improve quantification of the forces that bring about climate change;
3. Reduce uncertainty of projections of how the Earth's climate may change in the future.
4. Understand the sensitivity and adaptability of ecosystems and human systems to climate change; and
5. Explore the uses and identify the limits of knowledge to manage risks and opportunities related to climate change.

To address these uncertainties the CCSP Strategic Plan calls for the production of over 20 rigorously peer reviewed Synthesis and Assessment reports during the next 5 years. EPA is a lead or co-lead agency on four reports and will contribute to most of the others.

*Question 6.* While it may be primarily an FDA and/or USDA issue, I'd also like to ask if you see a role, and if so, what, in which EPA can help ensure that foreign

seafood processing facilities preparing food for export to the U.S. are actually following required HACCP plans, and ensure that companies which supply the processing facilities, such as aquaculture companies, are not using products such as fungicides and pesticides that are permitted in that country, but not permitted for U.S. aquaculture operations?

Response. All food, including seafood—whether of domestic or foreign origin—to be sold in the United States—must have a tolerance (maximum amount of a pesticide allowed to remain in or on foods). The Federal Food, Drug and Cosmetic Act (FFDCA) requires EPA to establish or change these tolerances after conducting a risk assessment to ensure the food will be safe provided the pesticide is applied legally. Once established, EPA publishes these tolerances in the Federal Register.

FDA uses the tolerances established by EPA when it inspects food, including seafood, produced in and outside the U.S. FDA samples imported and domestic foods to ensure that pesticide residues are within established tolerances or are covered by exemptions. If not, they are considered adulterated and are subject to enforcement through FDA. FFDCA can prohibit movement in interstate commerce of adulterated and misbranded foods.

Also, through a communication system established by the World Trade Organization (WTO), we ensure that our trading partners are aware of our rules for accepting their exports to the U.S. We do this by notifying the WTO of regulatory actions that could affect international trade, which is primarily tolerance actions. So, if EPA establishes a new tolerance, changes or revokes an old one, the WTO and all its members are informed.

*Question 7.* When you appeared before this committee to discuss the agency's budget for Fiscal Year 2005, we had a conversation about the Village Safe Water Program in Alaska. At the conclusion of that conversation, you agreed that the EPA would work with the State of Alaska to address whatever concerns that the EPA might have over the operation of the program in past years. I hope that I impressed upon you the urgency of resolving those differences because nobody in America should have to live in a community that lacks basic sanitation facilities. My question is what progress has the EPA made since you last appeared before this committee to resolve these differences and restore funding to this important program?

Response. EPA has instituted a number of management changes and enhanced procedures and tracking systems that improve oversight and accountability in the Village Safe Water Program in Alaska.

I am pleased to report:

- The State priority system for selecting candidate projects has been revised to directly reflect program goals and objectives;
- State funding requests are now required to explicitly include goals, objectives and environmental outcomes;
- The State Department of Environmental Conservation (DEC) has made significant improvements to its financial and procurement systems; and
- EPA's Regional office in Seattle has assigned a new project officer to manage the sanitation grant, and the Village Safe Water Program in Alaska DEC is under new leadership.

Further actions currently underway:

- EPA and Alaska are working with the Indian Health Service to develop a detailed project tracking and allocation data system to document progress toward program goals, objectives and environmental measures;
- EPA and the State are developing a Memorandum of Understanding as well as program guidelines that will stress achievement of financial management practices, program management accountability, and program performance goals and measures; and
- EPA will review the State's FY05 grant application package (\$45 million) for compliance with all Federal requirements and program goals.

EPA will be monitoring the implementation of the Village Safe Water Program very closely.

*Question 8.* When we first met during this committee's budget hearing several weeks ago, I was not certain whether you fully understood what the goal of the Village Safe Water program in Alaska is. Now that you have had a few weeks to study the matter, I wonder if you might explain to the committee what you have learned about the sanitation conditions in rural Alaska and whether you think that the Village Safe Water program is worthy of continued federal financial support?

Response. The Village Safe Water Program serves approximately 232 Alaska Native Villages, approximately 80 rural communities, and about 50,000 households.

In 1998, at the beginning of this program, about 40 percent of households lacked water/wastewater infrastructure; that number has improved to 23 percent today.

This success is due in large part to the \$325 million which has been appropriated since 1995.

The challenges in bringing infrastructure to the remaining 23 percent include remote locations, scattered populations, poor or frozen soils, harsh climate, limited cash economies, poor maintenance, and language/cultural barriers.

I recognize the value of continuing to invest in water and wastewater infrastructure in Alaska.

*Question 9.* When you last appeared before the committee, I suggested that it is important for you to visit Alaska and experience the sanitation challenges we face in our remote Alaska Native communities. Do you have any plans to travel to my State in the near future?

Response. I appreciated the opportunity to discuss with you prior to my confirmation hearing the unique and serious environmental issues confronting many communities in Alaska. I appreciated your invitation to visit several of these communities to understand first-hand these problems. I look forward to accompanying you on such a visit at your convenience. In the meantime, I will continue to work with my staff to identify solutions for these communities that are cost-effective and appropriate given their unique circumstances.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR THUNE

*Question 1.* Applicability of CERCLA/EPCRA Release Reporting Requirements to Cattle Operations.—A number of cattle producers in South Dakota have expressed to me their concern about an issue that I believe shouldn't even be an issue for cattle operations but has become one in today's climate of citizen suits. The issue is whether or not CERCLA and EPCRA release reporting requirements apply to open-air beef cattle operations?

It is my understanding that the EPA has issued a consent agreement with the pork, poultry and dairy industries on this subject. Those industries are different from cattle operations in important ways for purposes of applicability of this law. Those industries house their animals in barns and use anaerobic lagoons to treat waste.

Cattle operations I am concerned about, on the other hand, feed cattle in open-air feedlots and use shallow, aerobic precipitation retention ponds to catch runoff.

Under section 104 of the Act, Congress specifically excluded from clean up action "naturally occurring substances in unaltered form, or altered solely through naturally occurring processes or phenomena." An example of a naturally occurring substance cited in the Senate Committee Report is "animal wastes (e.g. beaver excrement)" which produce ammonia and hydrogen sulfide. I believe emissions from manure, flatulence and belching in cattle operations fit under this exclusion.

In addition, EPA has exempted from release reporting requirements operations that produce radionuclides. The criteria EPA used for the exemption include: (1) continuous low level emissions over large areas; (2) rapid dispersion of the emission in the environment; (3) acceptable exposure risk (Congress specifically recognized the low risk of low level continuous ammonia releases); and, (4) infeasibility and inappropriateness of a response. Ammonia and trace hydrogen sulfide emissions from cattle operations fit squarely within these criteria for an exemption.

"Ammonia when used to produce or manufacture fertilizer or when used as a nutrient in animal feed" is specifically exempted from the CERCLA tax, due to the "unnecessary burden" it would place on agriculture. It would be absurd to construe coverage of CERCLA/EPCRA release reporting to exempt the application of chemical fertilizers, but to treat flatulence, urination and defecation as "releases" of "hazardous substances" from "facilities".

I understand that EPA staff is in agreement concerning feedlots not being subject to the CERCLA/EPCRA reporting requirements.

While the EPA has been aware of this issue since December 2003, no informal ruling has been given. As the President's nominee to head-up the EPA, I would appreciate an official answer to this outstanding matter.

Response. EPA is working diligently on this issue. EPA has met with the cattle industry and their representatives on numerous occasions have suggested various ways of proceeding to address the reporting issue, and remain open to discussing this issue. I will keep you informed of our progress.

*Question 2.* Given the current status of the Superfund program, do you believe that the EPA should look at alternative financial mechanisms that would encourage Potentially Responsible Parties (PRPs) to reach settlement and begin cleanups soon-

er? In particular, I'm interested in the potential expanded use of work substitute contractors

Response. EPA will continue to be receptive to innovative financing approaches in settlements at Superfund sites. EPA has agreed to settlements involving "work-substitution contractors," combined with fully-funded insurance programs as financial assurance.

To date, innovative financing and work substitution approaches have been used at a variety of sites, with a variety of PRPs. The PRPs' commitment to achieving a settlement with one or both of these features is critical, particularly because the PRPs may incur additional, up-front transactional or financial costs to implement these approaches. When innovative financing or alternative work substitution approaches are proposed by PRPs at a particular site, EPA has been and will continue to be open to considering them.

*Question 3.* Would you consider a pilot program in each EPA region to identify sites that might be positively impacted by such a new approach? While not a panacea for all Superfund cleanups, I believe the EPA could allow for greater use of this innovative practice—especially in light of the success at the Iron Mountain site in California

Response. EPA will continue to be open and encourage innovative practices such as alternative work substitution approaches when they are proposed by PRPs at a particular site

*Question 4.* It is my understanding that the States (including South Dakota) recently submitted to EPA a third list of fungicides for proposed use in combating soybean rust. This list is now before EPA for Section 18 emergency exemption review. Several of the active ingredients on this third list are already approved for use by farmers in South America. As the growing season approaches and U.S. farmers are faced with the imminent threat of soybean rust, what assurances can you provide that EPA will devote the necessary resources to reviewing these products in a timely manner so that our farmers may have access to the same tools available to their Brazilian counterparts?

Response. EPA received a third request under the emergency exemption provision of FIFRA for new and additional soybean fungicides from the South Dakota and Minnesota Departments of Agriculture. EPA intends to process this new request as quickly as possible.

EPA shares your concern for soybean rust and has made an extensive investment in the review of fungicides that are effective in controlling the highly destructive plant pathogen that causes soybean rust. Eight pesticide products are already fully registered to control soybean rust. In addition, EPA has approved 133 emergency exemptions for other pesticides to control soybean rust. These include five exemptions for South Dakota. These emergency exemptions supplement the available registrations and provide growers with products which have proven to be effective at controlling the soybean rust pathogen in countries where the disease is already established. Overall, there are 18 products, containing one or more pesticide ingredients, available at this time. To help farmers know what pesticides are available, EPA maintains a website with up-to-date information on the status of available pesticides.

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RESPONSE OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTION FROM  
SENATOR VITTER

*Question 1.* Mr. Johnson, the restoration of Coastal Louisiana is a top priority for me, for the other members of Louisiana's congressional delegation, and for the State of Louisiana. In your testimony you mention the importance of collaboration to address environmental problems such as the Great Lakes.

In Louisiana, we have an environmental crisis: our coast is eroding and wetlands (much of it critical habitat) are disappearing at an alarming rate. This also negatively impacts everyone in the nation who relies on resources supplied by Louisiana. Once confirmed, how would you respond to this problem? How would you incorporate coordination and build partnerships collaborate with other federal agencies, the state, and local communities? How will you exercise your leadership and devote federal resources to restore coastal Louisiana and its wetlands?

Response. EPA fully recognizes the threat that past and ongoing wetland and barrier island loss poses to the safety, economy, and culture of coastal Louisiana, as well as the Nation's economy.

Since passage of the Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA) in 1990, EPA has been working closely with our Federal and State part-

ners to develop and implement the most effective restoration projects. To date, we have implemented a number of barrier island restoration projects, thereby helping to maintain the ecological and storm protection functions provided by these important resources.

We continue to seek innovative strategies that could complement barrier island and river diversion efforts. For example, we are currently promoting the use of long-distance sediment transport to rebuild lost wetlands in the near-term and in strategic locations.

CWPPRA has proven to be an effective and essential part of the overall effort to save coastal Louisiana. However, CWPPRA alone will not address the problem. We believe that we must maintain and build upon CWPPRA with complementary programs, which focus on a larger scale. For this reason, we participated actively with the State, Corps of Engineers, and other important stakeholders in the development of the Louisiana Coastal Area (LCA) Ecosystem Restoration Plan.

The LCA Plan is an excellent next step in the effort to save coastal Louisiana. However, additional large-scale measures will be needed to fully address past and ongoing wetland and barrier island losses in coastal Louisiana.

As Administrator, I would continue EPA's involvement in both CWPPRA and the LCA Plan. The multi agency effort and grass-roots public participation afforded by CWPPRA are crucial to our success in continued restoration of Louisiana's coast. The challenges posed by Louisiana's coastal loss are too great to be solved by any one agency or by government alone.

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RESPONSE OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR JEFFORDS

*Question 1.* Sometime ago, Administrator Leavitt informed the Committee that the proposed implementation rule for the fine particulate matter standard would be issued by the end of 2004. Can you provide a date certain by which that rule will be proposed and become final?

Response. On December 17, 2004, EPA took final action to designate attainment and nonattainment areas under the more protective national air quality standards for fine particles (PM<sub>2.5</sub>). The implementation rule for PM<sub>2.5</sub> will provide guidance to the States on a number of issues related to the attainment process, including precursor pollutants to be addressed by states, reasonable further progress options, and options for area classifications.

The inter-agency review will be completed shortly, after which time I will sign the proposed rule and it will be published in the Federal Register. In the interim, we have issued informal guidance to the states to assist them as they begin to develop their implementation plans.

*Question 2.* One of the most successful multi-lateral environmental treaties ever negotiated is the Montreal Protocol. I am concerned that the U.S. appears to be slower than most other countries in phasing out methyl bromide as a soil and building fumigant and that this may threaten U.S. participation and compliance with this treaty. Are you committed to ensuring that the U.S. remains in compliance with this treaty, and what can be done to more rapidly replace methyl bromide with substitute compounds and technologies?

Response. I am committed to the Montreal Protocol, including our responsibility to end use of methyl bromide and support the shift to alternatives that are safe for the ozone layer. On January 1, 2005, EPA phased out production of MeBr, except for limited exemptions. Since that time, EPA has worked with the State Department and the Department of Agriculture to implement a "critical use exemption", as authorized by the Parties to the Montreal Protocol.

I also am committed to rapidly registering good alternatives to Methyl Bromide. Reductions in U.S. exemption requests have been possible partly because alternatives already registered can displace certain existing uses of Methyl Bromide.

*Question 3.* The President's budget proposes draconian cuts in the EPA ozone protection program, cuts that will force the agency to curtail its skin cancer awareness effort, known as the SunWise program, and slow its ability to review information on critical use exemptions on methyl bromide, as well as approving methyl bromide substitutes. Will you support restoring funding for this program?

Response. I believe it is important to protect children's health from preventable disease and I will review funding for this program. SunWise has been a highly successful skin cancer awareness program, and is now used in over 10,500 schools in every U.S. state to help kids understand simple behavior changes that can reduce their risk of developing skin cancer later in life.



*Question 4.* The Superfund program is withering on the vine. Each year, EPA puts out a list of Superfund sites that lack money for cleanup. The Elizabeth Mine in Vermont has been on this list year after year. The Wall Street Journal reports that the Superfund funding shortfall may reach \$750 million in 2006. Yet the Administration opposes reinstating the Superfund fees and has not proposed to fully fund the program. What steps would you take as Administrator to ensure that all toxic waste dumps listed on the National Priorities List are cleaned up without further delay?

Response. I strongly support and enforce the "polluter pays principle" under the Superfund law. The success of the polluter pays principle is illustrated by the fact that roughly 70 percent of Superfund sites are cleaned up by the parties responsible for hazardous waste, an average of \$838 million per year to clean sites as mandated by EPA. A broader perspective shows that, over the history of the program, EPA has required responsible parties to spend more than \$21 billion on cleaning up contaminated properties.

EPA has always relied upon Congress to appropriate funds for the Agency to pay for cleanups at Superfund sites. Superfund program appropriations have remained relatively steady over the past 5 fiscal years at \$1.3 billion to \$1.5 billion. The FY 2006 President's Budget Request continues to maintain steady funding for the program.

The Agency is making significant progress in cleaning up Superfund sites. Unlike in previous years where smaller, less costly sites were targeted for cleanups, we are now addressing large and complex sites that present unique clean-up challenges. Cleaning up these sites requires a disproportionate share of Superfund money. I can assure you however, that new projects that are not funded have been secured, often have had prior cleanup work and pose no immediate threat. EPA will not put communities at risk and will continue to protect human health and the environment.

*Question 5a.* The voluntary High Production Volume challenge program appears to be making important strides, but I am concerned that it may not be receiving the resources it needs. I'm told that EPA is well behind in commenting on the industry submitted test plans and in reviewing the final submissions. And just recently, the American Chemistry Counsel has proposed expanding the HPV program to include an additional 500 chemicals. Yet the President has proposed cutting the HPV challenge program budget by \$850,000. As Administrator, what steps will you take to ensure that the HPV program obtains the financial resources it needs?

Response. I am extremely pleased with the success of this voluntary, collaborative program. More than 400 companies committed to make publicly available basic health and safety information on 2200 high-production volume chemicals. I am also pleased that the American Chemical Council, the Soap and Detergent Association, and the Synthetic Organic Chemical Manufacturers Association are building on this success by their Extended HPV program which will increase by 500 the number of HPV chemicals being addressed through voluntary efforts.

The Agency is currently experiencing a delay in reviewing and posting our comments on test plans submitted by industry. Several factors have contributed to this delay, including the large number of test plans that come into the Agency at the end of the last calendar year instead of over the course of the year. To further speed the reviews, EPA is continuing to work on efficiencies that can be achieved as our data systems are enhanced and conduct more international cooperation. We will post comments on all test plans as they are available.

I believe our current budget request provides the HPV program with the resources it needs to fulfill its primary mission of making critical chemical information available to the public, while supporting the screening and prioritization work on HPV chemicals that EPA will be commencing with available resources in FY 2006. I commit to you that the Agency will carefully consider the future resource needs of the HPV program.

*Question 5b.* The HPV program only requires screening level data and does not apply to thousands of chemicals produced below 1 million pounds per year. As Administrator, what are the next steps you will take to ensure that all chemicals used in commercial products—regardless of production volume—are safe?

Response. I take very seriously the Agency's responsibility to ensure that the chemicals used in commercial products do not present unreasonable risks. The Agency has concentrated its current screening efforts on the highest volume subset of the chemicals contained on the TSCA Inventory. The chemicals included in the initial HPV Challenge Program represent about 90 percent of total U.S. chemical production. The Agency has other regulatory and voluntary efforts directed at chemicals in commerce. Specifically, the Voluntary Children's Chemical Evaluation Program involves data collection and risk assessment to identify and obtain testing

needed for a detailed evaluation of 20 pilot chemicals that may pose a risk to children. Assessments have also been conducted in support of numerous regulatory activities directed at lower volume chemicals presenting significant risk potential, including the development of Significant New Use Rules on individual chemicals and several classes of chemicals, including PFOS derivatives, benzidine dyes, and others. In recognition of the ongoing EPA work on HPV chemicals, the TSCA section 4(e) Interagency Testing Committee has started focusing more of its attention on identifying testing priorities for lower volume chemicals.

Even as we use our TSCA tools to ensure that chemicals already in the marketplace do not present unreasonable risks and to take action if there are concerns, we also continue to act as a “gatekeeper” to ensure that all new chemicals are reviewed by the Agency prior to use and appropriate actions taken. EPA typically reviews more than 1,500 new chemicals per year (most of which are lower volume chemicals), of which only 50 percent go on to commercial production.

In the fall of 2003, EPA established the National Pollution Prevention and Toxics Advisory Committee (NPPTAC) to provide policy advice and recommendations on future directions of EPA’s risk management and pollution prevention programs. EPA look forward to working with the NPPTAC to obtain advice regarding additional steps EPA should consider in assessing and managing chemical risks and in implementing our pollution prevention programs.

*Question 5c.* What is the status of EPA’s December 2000 proposed test rule requiring manufacturers of the first set of “orphan” chemicals to develop hazard data, and when does the Agency plan to issue additional rules for the remaining “orphan” chemicals?

Response. EPA plans to promulgate the initial HPV test rule this fall and to propose the next HPV test rule in the spring of 2006.

*Question 6.* While the Administration has halted plans to change Clean Water Act rules, I am greatly concerned that the guidance document jointly issued by EPA and the Army Corps of Engineers in January, 2003 is still in effect. This guidance removes Clean Water Act protections for what your agency has estimated to be about 20 million acres of wetlands. Given the decision not to proceed with rule changes and last year’s GAO study which revealed that, at least for Corps of Engineers Districts, this guidance is resulting in widely varying interpretations of Clean Water Act jurisdiction, has your agency reconsidered the need for withdrawal of this guidance and if not, why? What are your plans to ensure that the Clean Water Act is consistently applied throughout the nation?

Response. The January 2003 legal guidance states that field staff may no longer assert jurisdiction over isolated, intrastate, non-navigable waters based solely on the migratory bird rule, and that agency headquarters approval should be obtained prior to asserting jurisdiction over such waters based solely on other types of commerce links. The legal memorandum emphasizes that field staff should continue asserting jurisdiction over navigable waters, their tributary systems, and adjacent wetlands. The memorandum also emphasizes that jurisdictional calls must reflect existing regulations and relevant case law.

EPA and the Corps are committed to increasing consistency, transparency, predictability, and sound science for the CWA section 404 program. The agencies are taking a number of steps in response to the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County (SWANCC)*. As we implement these actions and monitor their effectiveness, we are continuing to assess the adequacy of existing field practices, guidance, and training programs and will take appropriate steps to ensure Clean Water Act jurisdiction is correctly determined. EPA and the Corps are working together, based on the two years of experience will make decisions based upon that experience, current information and emerging case law.

*Question 7.* The only thing that the Supreme Court struck down in the *SWANCC* decision was the policy of using the presence of migratory birds as the sole basis for jurisdiction under the Clean Water Act. This is the Department of Justice’s interpretation of the *SWANCC* decision. Why didn’t EPA and the Corps simply issue a directive to field staff, stating that the migratory bird policy is no longer to be used alone to establish jurisdiction, but stress that all other current Clean Water Act rules should continue to be implemented to the full extent of the law? Would you consider that course of action as Administrator?

Response. On January 15, 2003, EPA and the Corps issued joint legal guidance that clarified the scope of “waters of the United States” in light of the U.S. Supreme Court’s decision in *SWANCC* and subsequent judicial decisions (68 FR 1991, 1995 (January 15, 2003)). The legal guidance directs field staff to no longer assert jurisdiction over isolated, intrastate, non-navigable waters based solely on the migratory bird rule. Moreover, the legal guidance confirms the Agencies’ commitment to assert

jurisdiction to the maximum extent of the law. Consistent with this legal guidance, field staffs at both EPA and the Corps continue to implement and enforce programs affecting all “waters of the United States” protected under the CWA after SWANCC. As Administrator, I will work with the Corps and, based on the two years of experience with the January 2003, guidance, assess the continued effectiveness of the guidance and make decisions based upon experience, current information and emerging case law.

*Question 8.* The EPA/Corps guidance includes a “phone home” policy whereby regulators that believe it appropriate to assert jurisdiction over any water that might be considered “isolated” must first gain permission from headquarters. How many times has your agency been asked to consult on such a decision? Is it feasible that this hurdle may be encouraging regulators to “when in doubt, throw in the towel” on jurisdiction? If not, how do you explain the extremely limited number of consultations that have been requested?

Response. The January 2003, guidance calls for field staff to obtain formal EPA and Corps headquarters approval prior to asserting jurisdiction based solely on links to interstate commerce. We have received six requests for formal headquarters approval, plus an additional handful that involved navigable-in-fact isolated waters that do not require headquarters approval. Of those six, headquarters is seeking additional information on two, found two to be jurisdictional, and two to not be jurisdictional.

We are continuing to assess the adequacy of field practices, guidance and training programs and will take appropriate steps to ensure Clean Water Act jurisdiction is correctly determined. EPA and the Corps are working together, based on two years of experience with the guidance, to assess its effectiveness and will make decisions based on that experience, current information and emerging case law.

*Question 9.* EPA has requested that the Corps of Engineers provide reports of their jurisdictional determinations to EPA. What has been the response to this request? Has the EPA received sufficient information to determine if the Corps Districts are making the right decisions with regard to jurisdiction? If not, what do you propose to do to ensure that the Clean Water Act is being appropriately implemented in all regions of the country?

Response. The Corps and EPA have been working together to assess the resource implications of SWANCC, and the agencies are committed to increasing the consistency, transparency, and sound science for the Clean Water Act (CWA) section 404 program. As part of this broader effort, the Corps Districts have posted information on their websites regarding findings of no-jurisdiction, and Corps headquarters has shared with us draft summaries forwarded by the Districts and Divisions. Analysis of that information is on-going. EPA and the Corps are continuing to assess the adequacy of existing field practices, guidance, and training programs, and will take appropriate steps to ensure CWA jurisdiction is correctly determined. EPA and the Corps are working together, based on the two years of experience with the guidance, to assess its effectiveness, and will make decisions based on that experience, current information and emerging case law.

*Question 10.* Are you aware of additional case law that has developed since the SWANCC guidance was put in place? Would you agree that cases, such as the Fourth Circuit’s rulings in *U.S. v. Deaton* and *U.S. v. Newdunn* and the 6th Circuit’s *U.S. v. Rappanos* have changed the legal landscape as summarized in the EPA/Corps SWANCC guidance? Wouldn’t you agree that the legal summary in the guidance is now out of date and misleading to those who do not have access to legal council on a daily basis? What are your plans to remedy this?

Response. EPA and the Corps are taking a number of steps in response to the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County (SWANCC)*. As we implement these actions and monitor their effectiveness, we are continuing to assess the adequacy of existing field practices, guidance, and training programs, and will take appropriate steps to ensure Clean Water Act jurisdiction is correctly determined. Together the Agencies, based on two years of experience with the January 2003, guidance, will assess its effectiveness and make decisions based on that experience, current information and the emerging case law affirming the government’s position in the cases noted in your question.

*Question 11.* This Administration has renewed the commitment to “no net loss” of the Nation’s wetlands. How can this possibly be achieved if the guidance has removed protection for more than 20 million acres of wetlands and we were still losing at least 58,000 acres of wetlands prior to the SWANCC decision—despite the best efforts of our Farm bill programs, the fine work of groups like Ducks Unlimited, the North American Waterfowl Management plan, and others?

Response. The EPA continues to support and implement the Administration's commitment to the goal of "no net loss" of wetlands under the section 404 regulatory program as well as the President's aggressive new national goal to achieve an overall increase of America's wetlands each year. To achieve these goals, EPA will continue to implement and enforce programs affecting all "waters of the United States" after SWANCC, to the maximum extent of the law. The Administration will also continue to work with our valuable partners to achieve these goals through important programs such as those included in the Farm bill, which provide a critical link to wetland conservation on millions of acres of farm land. As part of the effort to accurately track our progress toward this goal, the Administration is committing to produce a 2005 version of the National Wetland Inventory, that will help provide the agencies with important baseline data.

*Question 12.* You served as head of the Director of the Office of Pesticide Programs, which is charged by federal laws with ensuring that pesticides are used in a manner that does not pose a risk to human health. In particular, the laws require EPA to account for the special susceptibility of infants and children to the toxic effects of the many pesticides they are exposed to. Unfortunately, there have been claims that EPA's decisions in the area of pesticide regulation too often erred on the side of the interests of the pesticide manufacturing and application industries, instead of the health and safety of our nation's children. For example, in 2001, EPA reversed a decision to require manufacturers of rat poison to include bittering agents that would help prevent childhood poisonings, based only on the recommendations of pesticide applicators. Similarly, EPA faced charges that it had failed to apply a special statutory tenfold safety factor to protect infants and children from pesticides in their food. In making these decisions, EPA relies almost exclusively on data provided by the pesticide manufacturers whose only motive is to sell more of their products. Can you give any assurance that as Administrator you will give more weight to the laws' presumptions in favor of protecting human health, particularly children's health?

Response. I am committed to ensuring that the laws administered by EPA are implemented and enforced in a manner that protects human health, particularly children. EPA's decisions during my years with the Office of Pesticide Programs have brought significant new safeguards for pesticide use and we are already seeing the results. Pesticide poisonings of children by chlorpyrifos have fallen dramatically, and residues in children's food from a number of pesticides have declined.

I understand that there has been controversy about some of the decisions taken by EPA's pesticide program. In addition to those who think we have not ensured sufficient protections, I have heard from many who claim the Agency has gone too far. While I believe the Agency has acted reasonably with regard to the issues you highlight, I would like to provide you with an explanation of our positions.

Regarding the regulation of rodenticides, in 1999, EPA formed the Rodenticide Stakeholders Workgroup as a subcommittee under the federally-chartered advisory body, the Pesticide Program Dialogue Committee (PPDC), to consider, among other things, the risks to children of accidental exposure to rodenticides and potential measures to reduce such exposures. This workgroup included representatives from the EPA, CDC, USDA, State officials, the medical community, public interest groups, the pesticide industry, and members of the general public. The workgroup fully considered the possibility of requiring bittering agents in rodenticide products as it reviewed information presented by a broad range of interested and affected parties. The workgroup ultimately recommended against the requirement of bittering agents due to the potential for adverse effects on the efficacy of rodenticide products. This recommendation reflected their recognition of the significant public health risks posed by rodents, and the widely held concerns that requiring all products to contain bittering agents could hinder efforts to control rodent populations in certain circumstances. EPA adopted the workgroup's recommendations, and in November 2001 issued a Federal Register notice announcing its decision to rescind the bittering agent requirement. While EPA does not currently require bittering agents in all rodenticide products, the Agency encourages rodenticide manufacturers to incorporate them voluntarily in certain products. In fact, many of the rodenticide products on the market today do contain bittering agents. Finally, we are still in the process of completing our reevaluation of the rodenticides, and we will continue to monitor all available information on childhood poisonings. As we bring our review to closure, we will make sure that appropriate risk mitigation measures are put into place to ensure the safety of children.

Regarding protecting children under the Food Quality Protection Act, when establishing or reviewing tolerances under the Federal Food Drug, and Cosmetic Act, the EPA is required to apply an additional tenfold safety factor to protect infants and

children, unless the Agency can find on the basis of reliable data that another safety factor will adequately protect infants and children. In order to ensure that the Agency implemented this critical provision, EPA used a very public process to develop guidance explaining how such decisions should be made. In addition to seeking public comment, the Agency sought advice from its independent expert scientific peer review body, the FIFRA Scientific Advisory Panel, on several occasions. Generally, the guidance calls for EPA to review the extensive database available on each pesticide and to retain the additional tenfold safety factor unless we have a sound scientific database to support a change.

Following this guidance, EPA has made several hundred chemical-specific determinations under this provision. Each of these decisions is fully documented in reviews that are available to the public as part of the Agency's public participation process. For just over half of the pesticides, EPA concluded that the additional tenfold factor is not necessary and therefore may be removed. For the balance of the pesticides, EPA has retained some additional safety factor, in some case the statutory tenfold factor, and in other cases factors ranging from 3 to 30. We believe that examination of the individual chemical decisions about safety factors will demonstrate that EPA's conclusions are based on scientific assessments.

*Question 13.* On October 5, 2004, Senator Sarbanes and I wrote to Administrator Leavitt asking why the Agency testified during the last Congress that provisions of the Jeffords-Sarbanes/Norton-Waxman Lead Free Drinking Water Act of 2004 were "premature" when the Agency is requiring that the Washington Aqueduct and Sewer Authority perform these same actions when dealing with the lead crisis in Washington, DC. A copy of the letter follows and I request that you respond.

October 5, 2004.

Administrator LEAVITT,  
Environmental Protection Agency,  
Washington, DC.

DEAR ADMINISTRATOR LEAVITT: We are writing to you regarding the Environmental Protection Agency's implementation, oversight, and enforcement of the Lead and Copper Rule and your ongoing review of the drinking water regulations pertaining to lead. Earlier this year it was first reported that lead levels in the DC public water system were significantly higher than federal guidelines, and had been so for more than two years. Today, the Washington Post reported that data showed cities throughout the nation have avoided the requirements of the Lead and Copper Rule by manipulating the sampling and testing process. Clearly, it is time for the federal government to take the recent threats to our public water systems seriously and impose tougher standards and requirements to ensure the public health.

Lead is a serious health threat to children and pregnant women. It is particularly dangerous for children. Children exposed to lead can experience low birth weight, growth retardation, mental retardation, learning disabilities, and other effects. It is also particularly harmful during pregnancy.

On April 7, we introduced the Lead-Free Drinking Water Act of 2004, S. 2733, which seeks to strengthen the federal standards for lead in drinking water to protect public health. Our colleagues in the House, Delegate Eleanor Holmes-Norton (D-DC) and Congressman Waxman (D-CA) introduced the House companion bill, H.R. 4268. This legislation used the Washington, D.C. lead experience as a blueprint for improvements that should be made to the nationwide regulations. This bill would provide funding and requirements for replacing lead pipes, it would close loopholes in the existing regulations, it would require stronger rules for public notice, it would require the removal of lead from our schools, and it would revise the definition of "lead-free."

On May 21, 2004, the Agency testified before the House Government Reform Committee that the "Lead-Free Drinking Water Act of 2004" is "premature at this time." However, there are several weaknesses highlighted by the data analysis presented by the Washington Post today, and incorporated by EPA in the compliance order for the Washington Aqueduct and Sanitation Authority (WASA) which suggest many provisions of the legislation are sorely needed.

For example, the Washington Post article identifies manipulation of test results by utilities during the test site selection process, with inappropriate elimination of sites, with sample invalidation, and with changes in the numbers of homes tested. The Lead-Free Drinking Water Act of 2004 requires that the EPA substantially revise the monitoring requirements of the Lead and Copper Rule to require more frequent monitoring, to ensure that the monitoring is statistically-relevant and fully representative of all types of residential dwellings and commercial establishments,

and to enhance frequency and scope of monitoring when water chemistry is changed. In addition, to improve enforcement and eliminate fraud with the reporting of test results, the Act requires that all lead test results be submitted electronically directly to the Administrator or State or local agency. Please explain why the Agency opposes improvements to the sampling methodology for lead in drinking water proposed by the Lead-Free Drinking Water Act of 2004.

The Washington Post article also states that in the spring of 2004, EPA regulators identified a series of loopholes in the regulations that weaken protections against lead in drinking water. They included: nothing requires utilities to notify individual homeowners that their water has high lead, and the regulation does not allow the same stiff sanctions for high lead that it does for other contaminants such as bacteria. The Lead-Free Drinking Water Act of 2004 would require this type of notification for homeowners and would require the Agency to re-evaluate the regulatory structure for lead in drinking water and establish a maximum contaminant load or a treatment technique that is more protective of human health than current standards. Please explain why the Agency testified that the Lead-Free Drinking Water Act of 2004 was "premature" when Agency regulators had identified the exact weaknesses in the current EPA regulations that the bill will eliminate.

In addition, in June 2004, the Agency issued a compliance order with WASA, which actually requires many things that are not required by current regulations, but are required by the legislation. We are pleased that the Agency believes these ideas will improve the public health of Washington, D.C., but we are puzzled why the Agency does not believe the entire nation should receive the health benefits from these improvements which will reduce the public's exposure to lead in drinking water.

For example, the EPA compliance order requires WASA to take several corrective actions including:

- requires plans for updating its lead service line inventory and reporting to EPA
- requires WASA to strongly encourage full replacement of lead service lines with owners paying for their portion, including submission of a plan to EPA for encouraging homeowners to agree to full replacement
- prohibits the use of the "test out" procedure to count lead service lines as replaced even if they are not
- requires WASA to develop and submit a public education plan including public health issues, steps to reduce health risks, and take steps to address EPA recommendations on effectiveness of prior public education
- requires WASA to document to EPA that they have provided water filters to all customers suspected or known to have lead contamination at no charge as well as those with "unknown" service line materials
- requires WASA to submit detailed sampling plans to EPA.

Each of these items is required by the Jeffords-Sarbanes/Norton-Waxman Lead-Free Drinking Water Act of 2004. Please explain why the Agency testified that these actions are "premature" when the Agency is requiring that WASA perform these same actions.

We understand that the EPA is conducting an extensive review of the Lead and Copper Rule to determine if any changes to the current regulations are warranted. We urge you to revise the Lead and Copper rule to incorporate the provisions of the Lead-Free Drinking Water Act of 2004.

Some of the parents whose children were affected by the Washington, D.C. lead incident wrote to me saying, "It is our hope that other mothers in this country will not have to experience the frustration, anger, and fear that we have during the many months that this crisis has dragged without resolution." Despite our best efforts, today and tomorrow, mothers around the country will embark on this same experience as they learn more about the lead content of their city's drinking water. Safe drinking water is not a privilege; it is a right.

We urge you to re-evaluate your testimony on the Lead-Free Drinking Water Act of 2004 and endorse this legislation so that we can move forward quickly. We urge you to quickly revise the Lead and Copper rule to incorporate the regulatory elements of this legislation. These actions will help restore public confidence in a system that is broken and ensure that lead in our water is a thing of our past.

Sincerely,

PAUL SARBANES.

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Response. According to EPA files, responses to this letter were mailed on November 12, 2004. I am providing a copy of EPA's response for the record.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

NOV 12 2004

OFFICE OF  
WATER

The Honorable Paul Sarbanes  
United States Senate  
Washington, DC 20510

Dear Senator Sarbanes:

Thank you for your letter to Administrator Michael Leavitt, dated October 5, 2004, in which you outlined your continuing concerns about lead in drinking water, which were heightened by a recent article in The Washington Post newspaper.

I can assure you that the Environmental Protection Agency (EPA) is taking the allegations included in the Washington Post's article of October 5, 2004 very seriously. We specifically requested but were denied additional information from the newspaper to understand how it reached its conclusions. We continue to work with our regional offices and states to monitor compliance and reporting procedures. If the Agency determines that water utilities have intentionally manipulated data to avoid meeting the requirements of the Lead and Copper Rule, we will work with the states to ensure that appropriate enforcement actions are taken.

In testimony I have given before Congressional committees this year, I indicated that I believe legislation introduced earlier this year to revise the Safe Drinking Water Act (SDWA) on this matter is premature. I also expressed appreciation to bill sponsors and their committee colleagues for holding hearings and drawing attention to specific issues and areas for possible regulatory or legislative action.

The Agency is still engaged in determining areas where implementation of the existing regulation may be falling short. Moving to make changes before that process is completed could fail to capture all areas where improvements to guidance or changes to the regulations may be warranted. Additionally, the current law provides a framework for EPA to make appropriate changes to regulations or guidance. My concern is that, by amending the law to make changes to the framework, we could lock in solutions which may not prove to be effective in the long-term. It is also often appropriate to consider modifications through a rule-making process which can provide additional opportunity for public input.

With respect to the contents of the compliance order for the District of Columbia, the Agency does not believe it is appropriate to require all communities in the nation to abide by the requirements imposed upon the District of Columbia by our Regional office in its oversight role. Pursuant to Congressional direction, the Agency is working to take a more balanced risk-based targeting approach to its regulatory actions and leave flexibility to state agencies responsible for

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day-to-day oversight to determine the degree of response required by the situation. In the case of the District, where lead levels were significantly greater than the action level, the Regional office believed that an additional effort was required to address the situation and acted accordingly.

In the near future, we plan to release guidance that reiterates and clarifies the existing regulations with respect to several of the issues raised in the Washington Post's article. I have also asked my staff to provide me with a sense of what specific changes may be needed to existing guidance and/or regulations by the end of this year or shortly thereafter. It may be the case that some of the provisions included in your legislation will be reflected in any modifications we make. I will keep you informed as to our progress and follow-up actions.

EPA remains committed to ensuring that clean and safe drinking water is available nationwide to every person served by a public water system. I look forward to working with you and your colleagues to respond to additional questions or concerns that you may have. If you have any questions, please contact me, or your staff may contact Steven Kinberg of the Office of Congressional and Intergovernmental Relations at (202) 564-5037.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben H. Grumbles". The signature is fluid and cursive, with the first name "Ben" being particularly prominent.

Benjamin H. Grumbles  
Acting Assistant Administrator



*Question 14.* On December 20, 2004 I joined several of my colleagues in urging the EPA to reconsider the Agency's proposed guidance regarding "blending." I have not received a response. Do you plan to reconsider the guidance and take action to protect public health? If so, when? If not, why? A copy of this letter follows and I would appreciate a response.

*December 20, 2004.*

Administrator MICHAEL LEAVITT,  
Environmental Protection Agency,  
Washington, DC.

DEAR ADMINISTRATOR LEAVITT, We are writing to you regarding the Environmental Protection Agency's (EPA's) proposed guidance entitled "National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Wastewater Treatment Discharges During Wet Weather Conditions," which was published in the Federal Register on November 7, 2003 (68 FR 63042)(EPA Water Docket, ID #OW-2003-0025).

This policy would permit a process called "blending" which mixes partially treated sewage with fully treated sewage and discharges it directly into receiving waters. We recognize that in extremely limited circumstances, when no feasible alternatives exist, blending may provide an important, temporary solution to water quality problems associated with peak wet weather flows. However, we are concerned that EPA's proposed policy puts public health at risk because it would allow more frequent use of blending and undo many of the public health and environmental gains achieved under the Clean Water Act.

The main concern with the increased use of blending is its effect on the presence of bacteria, viruses, and pathogens in wastewater discharges. Some familiar examples commonly found in wastewater are cryptosporidium, E. Coli, and giardia, all of which cause intestinal illnesses of varying severity. A huge cryptosporidium outbreak in Milwaukee, Wisconsin, in 1993 caused more than 400,000 people to become ill and more than 100 people died. Secondary treatment and disinfection are the two processes most critical to reducing the presence of these contaminants.

The proposed blending guidance would allow water that receives only primary treatment to bypass the secondary treatment process and be discharged into receiving waters. Disinfection is not required by the proposed guidance as a condition of the use of blending, and it is not consistently required in areas where human contact with water is expected. Because EPA's proposed guidance increases the allowable uses of blending, it increases the likelihood that bacteria, viruses, and pathogens present in wastewater flows entering treatment plants will be discharged and will come into contact with people through swimming or drinking water.

In addition, the Agency's blending guidance undermines the 1994 EPA Combined Sewer Overflow (CSO) policy which requires, as part of a long-term control plan, the evaluation of alternatives to eliminate CSOs. By expanding the potential use of blending, it is likely that more communities will select blending instead of other alternatives with greater water quality benefits. The result will be a missed opportunity to clean up the nation's CSO discharges.

The public health ramifications of moving forward with the proposed blending guidance should not be ignored. We urge you to end consideration of this guidance.

Sincerely,

U.S. Senators Jim Jeffords, I-VT; Patrick Leahy, D-VT; John Kerry, D-MA; Edward Kennedy, D-MA; Chris Dodd, D-CT; Joe Lieberman, D-CT; Frank Lautenberg, D-NJ; Jon Corzine, D-NJ; Richard Durbin, D-IL; Jack Reed, D-RI; Harry Reid, D-NV; Hillary Clinton, D-NY; Charles Schumer, D-NY; Daniel Akaka, D-HI; Paul Sarbanes, D-MD; and Barbara Boxer, D-CA.

Response. According to EPA files, responses to this letter were mailed on December 30, 2004. I am providing a copy of EPA's response for the record.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 30 2004

OFFICE OF  
WATER

The Honorable James M. Jeffords  
United States Senate  
Washington, DC 20510

Dear Senator Jeffords:

Thank you for your December 20, 2004, letter to Administrator Leavitt regarding the Environmental Protection Agency's (EPA) draft guidance entitled "National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Wastewater Treatment Discharges During Wet Weather Conditions." I want to express my appreciation for your interest in this important issue and to assure you that your comments will be carefully considered as we decide how best to proceed. Let me also emphasize that as we make this decision, EPA's focus will be on providing the public with protection from exposure to contaminants, including pathogens, and ensuring access to clean, safe, and secure water nationwide.

Again, thank you for your letter. I appreciate your concern for the health and safety of the public and the environment. Please contact me if you have any questions, or your staff may contact Tom Dickerson, in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-3638.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ben H. Grumbles".

Benjamin H. Grumbles  
Assistant Administrator

*Question 15.* On October 14, 2004, I joined Senator Boxer in a letter to the Agency regarding the administration of the Safe Drinking Water Act as it pertains to hydraulic fracturing. I have not received a response. Please respond to the questions included in this letter as described below.

October 14, 2004.

Administrator MICHAEL O. LEAVITT,  
Environmental Protection Agency,  
Washington, DC.

DEAR ADMINISTRATOR LEAVITT: We are writing to you regarding the Environmental Protection Agency's (EPA's) administration of the Safe Drinking Water Act (SDWA) as it pertains to hydraulic fracturing. In recent months, the Agency has taken several key actions on this issue:

On December 12, 2003, the EPA signed a Memorandum of Understanding with three of the largest service companies representing 95 percent of all hydraulic fracturing performed in the U.S. These three companies, Halliburton Energy Services, Inc., Schlumberger Technology Corporation, and BJ Services Company, voluntarily agreed not to use diesel fuel in their hydraulic fracturing fluids while injecting into underground sources of water for coalbed methane production.

In June of 2004, EPA completed its study on hydraulic fracturing impacts and released its findings in a report entitled, "Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs." The report concluded that hydraulic fracturing poses little chance of contaminating underground sources of drinking water and that no further study was needed.

On July 15, 2004, the EPA published in the Federal Register its final response to the court remand (*Legal Environmental Assistance Foundation (LEAF), Inc., v. United States Environmental Protection Agency*, 276F. 3d 1253). The Agency determined that the Alabama underground injection control (UIC) program for hydraulic fracturing, approved by EPA under section 1425 of the SDWA, complies with Class II well requirements.

We are concerned that the Agency's execution of the SDWA, as it applies to hydraulic fracturing, may not be providing adequate public health protection, consistent with the goals of the statute.

First, we have questions regarding the information presented in the June 2004 EPA Study and the conclusion to forego national regulations on hydraulic fracturing in favor of an MOU limited to diesel fuel. In the June 2004 EPA Study, EPA identifies the characteristics of the chemicals found in hydraulic fracturing fluids, according to their Material Safety Data Sheets (MSDSs), identifies harmful effects ranging from eye, skin, and respiratory irritation to carcinogenic effects. EPA determines that the presence of these chemicals does not warrant EPA regulation for several reasons. First, EPA states that none of these chemicals, other than BTEX compounds, are already regulated under the SDWA or are on the Agency's draft Contaminant Candidate List (CCL). Second, the Agency states that it does not believe that these chemicals are present in hydraulic fracturing fluids used for coalbed methane, and third, that if they are used, they are not introduced in sufficient concentrations to cause harm. These conclusions raise several questions:

1. The data presented in the June 2004 EPA study identifies potential harmful effects from the chemicals listed by the Agency in this report. Has the Agency or does the Agency plan to incorporate the results of this study and the fact that these chemicals are present in hydraulic fracturing agents into the CCL development process, and if not, why not?

2. In the June 2004 EPA study, the Agency concludes that hydraulic fracturing fluids do not contain most of the chemicals identified. This conclusion is based on two items—"conversations with field engineers" and "witnessing three separate fracturing events" (June 2004 EPA Study, p. 4-17.)

- a. How did the Agency select particular field engineers with whom to converse on this subject?

- b. Please provide a transcript of the conversations with field engineers, including the companies or consulting firms with which they were affiliated.

- c. How did the Agency select the three separate fracturing events to witness?

- d. Were those events representative of the different site-specific characteristics referenced in the June 2004 study (June 2004 EPA Study, p. 4-19) as determining factors in the types of hydraulic fracturing fluids that will be used?

- e. Which companies were observed?

- f. Was prior notice given of the planned witnessing of these events?

g. What percentage of the annual number of hydraulic fracturing events that occur in the United States does “3” represent?

h. Finally, please explain why the Material Safety Data Sheets for the fluids identified as potentially being used in hydraulic fracturing list component chemicals that the EPA does not believe are present.

The Agency concludes in the June 2004 study that even if these chemicals are present, they are not present in sufficient concentrations to cause harm. The Agency bases this conclusion on assumed flowback, dilution and dispersion, adsorption and entrapment, and biodegradation. The June 2004 study repeatedly cites the 1991 Palmer study, “Comparison between gel-fracture and water-fracture stimulations in the Black Warrior basin; Proceedings 1991 Coalbed Methane Symposium,” which found that only 61 percent of the fluid injected during hydraulic fracturing is recovered. Please explain what data EPA collected and what observations the Agency made in the field that would support the conclusion that the 39 percent of fluids remaining in the ground are not present in sufficient concentrations to adversely affect underground sources of drinking water.

After identifying BTEX compounds as the major constituent of concern (June 2004 EPA study, page 4–15), the Agency entered into the MOU described above as its mechanism to eliminate diesel fuel from hydraulic fracturing fluids.

3a. How does the Agency plan to enforce the provisions in the MOU and ensure that its tenets are met?

b. Will the Agency conduct independent monitoring of hydraulic fracturing processes in the field to ensure that diesel fuel is not used?

c. Will the Agency require states to monitor for diesel use as part of their Class II UIC Programs?

4a. Should the Agency become aware of an unreported return to the use of diesel fuel in hydraulic fracturing by one of the parties to the MOU, what recourse is available to EPA under the terms of the MOU?

b. What action does the Agency plan to take should such a situation occur?

c. Why did EPA choose to use an MOU as opposed to a regulatory approach to achieve the goal of eliminating diesel fuel in hydraulic fracturing?

d. What revisions were made to the June 2004 EPA study between the December 2003 adoption of the MOU and the 2004 release of the study? Which of those changes dealt specifically with the use and effects of diesel fuel in hydraulic fracturing?

e. The Agency also states that it expects that even if diesel were used, a number of factors would decrease the concentration and availability of BTEX. Please elaborate on the data EPA collected and the observations the Agency made in the field that would support the conclusion that the 39 percent of fluids remaining in the ground (1991 Palmer), should they contain BTEX compounds, would not be present in sufficient concentrations to adversely affect underground sources of drinking water.

We are also concerned that the EPA response to the court remand leaves several unanswered questions. The Court decision found that hydraulic fracturing wells “fit squarely within the definition of Class II wells.” (LEAF II, 276 F.3d at 1263), and remanded back to EPA to determine if the Alabama underground injection control program under section 1425 complies with Class II well requirements. On July 15, 2004, EPA—published its finding in the Federal Register that the Alabama program complies with the requirements of the 1425 Class II well requirements. (69 FR No. 135, pp 42341.) According to EPA, Alabama is the only state that has a program specifically for hydraulic fracturing approved under section 1425. Based on this analysis, it seems that in order to comply with the Court’s finding that hydraulic fracturing is a part of the Class II well definition, the remaining states should be using their existing Class II, EPA-approved programs, under 1422 or 1425, to regulate hydraulic fracturing. To date, EPA has approved Underground Injection Control programs in 34 states. Approval dates range from 1981–1996.

5. Do you plan to conduct a national surveyor review to determine whether state Class II programs adequately regulate hydraulic fracturing?

At the time that these programs were approved, the standards against which state Class II programs were evaluated did not include any minimum requirements for hydraulic fracturing. In its January 19, 2000 notice of EPA’s approval of Alabama’s 1425 program, the Agency stated, “When the regulations in 40 CFR parts 144 and 146, including the well classifications, were promulgated, it was not EPA’s intent to regulate hydraulic fracturing of coal beds. Accordingly, the well classification systems found in 40 CFR 144.6 and 146.5 do not expressly include hydraulic fracturing injection activities. Also, the various permitting, construction and other requirements found in Parts 144 and 146 do not specifically address hydraulic fracturing.” (65 FR No. 12, p. 2892.)

Further, EPA acknowledges that there can be significant differences between hydraulic fracturing and standard activities addressed by state Class II programs.

In the January 19, 2000 Federal Register notice, the Agency states: . . . since the injection of fracture fluids through these wells is often a one-time exercise of extremely limited duration (fracture injections generally last no more than two hours) ancillary to the well's principal function of producing methane, it did not seem entirely appropriate to ascribe Class II status to such wells, for all regulatory purposes, merely due to the fact that, prior to commencing production, they had been fractured." (65 FR No. 12, p. 2892.)

Although hydraulic fracturing falls under the Class II definition, the Agency has acknowledged that hydraulic fracturing is different than most of the activities that occur under Class II and that there are no national regulations or standards on how to regulate hydraulic fracturing.

6. In light of the Court decision and the Agency's July 2004 response to the Court remand, did the Agency consider establishing national regulations or standards for hydraulic fracturing or minimum requirements for hydraulic fracturing regulations under state Class II programs?

a. If so, please provide a detailed description of your consideration of establishing these regulations or standards and the rationale for not pursuing them.

b. Do you plan to establish such regulations or standards in the future?

c. If not, what standards will be used as the standard of measurement for compliance for hydraulic fracturing under state Class II programs?

We appreciate your timely response to these questions in reaction to the three recent actions taken by the EPA in relation to hydraulic fracturing the adoption of the MOU, the release of the final study, and the response to the Court remand. Clean and safe drinking water is one, of our nation's greatest assets, and we believe we must do all we can to continue to protect public health. Thank you again for your response.

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Response. According to EPA files, responses to this letter were mailed on December 7, 2004. I am providing a copy of EPA's response for the record.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 7 2004

OFFICE OF  
WATER

The Honorable Jim Jeffords  
United States Senate  
Washington, DC 20510

Dear Senator Jeffords:

Thank you for your letter to Administrator Michael Leavitt, dated October 14, 2004, concerning the recent actions that the Environmental Protection Agency (EPA) has taken in implementing the Underground Injection Control (UIC) program with respect to hydraulic fracturing associated with coalbed methane wells.

The Office of Ground Water and Drinking Water (OGWDW) has prepared specific responses to your technical and policy questions regarding how we conducted the hydraulic fracturing study, the reasons behind our decisions pertaining to the recommendations contained in the study, and any plans or thoughts we may have on the likelihood for future investigation, regulation, or guidance concerning such hydraulic fracturing.

Since the inception of the UIC program, EPA has implemented the program to ensure that public health is protected by preventing endangerment of underground sources of drinking water (USDWs). The Agency has placed a priority on understanding the risks posed by different types of UIC wells, and worked to ensure that appropriate regulatory actions are taken where specific types of wells may pose a significant risk to drinking water sources. In 1999, in response to concerns raised by Congress and other stakeholders about issues associated with the practice of hydraulic fracturing of coalbed methane wells in the State of Alabama, EPA initiated a study to better understand the impacts of the practice.

EPA worked to ensure that its study, which was focused on evaluating the potential threat posed to USDWs by fluids used to hydraulically fracture coalbed methane wells, was carried out in a transparent fashion. The Agency provided many opportunities to all stakeholders and the general public to review and comment on the Agency study design and the draft study. The study design was made available for public comment in July 2000, a public meeting was held in August 2000, public notice of the final study design was provided in the *Federal Register* in September 2000, and the draft study was noticed in the *Federal Register* in August 2002. The draft report was also distributed to all interested parties and posted on the internet. The Agency received more than 100 comments from individuals and other entities.

EPA's final June 2004 study, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, is the most comprehensive review of the subject matter to date. The Agency did not recommend additional study at this time due to the study's conclusion that the potential threat to USDWs posed by hydraulic fracturing of coalbed

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methane wells is low. However, the Administrator retains the authority under the Safe Drinking Water Act (SDWA) section 1431 to take appropriate action to address any imminent and substantial endangerment to public health caused by hydraulic fracturing.

During the course of the study, EPA could not identify any confirmed cases where drinking water was contaminated by hydraulic fracturing fluids associated with coalbed methane production. We did uncover a potential threat to USDWs through the use of diesel fuel as a constituent of fracturing fluids where coalbeds are co-located with a USDW. We reduced that risk by signing and implementing the December 2003 Memorandum of Agreement (MOA) with three major service companies that carry out the bulk of coalbed methane hydraulic fracturing activities throughout the country. This past summer we confirmed that the companies are carrying out the MOA and view the completion of this agreement as a success story in protecting USDWs.

In your letter, you asked about the Agency's actions with respect to hydraulic fracturing in light of LEAF v. EPA. In this case, the Eleventh Circuit held that the hydraulic fracturing of coalbed seams in Alabama to produce methane gas was "underground injection" for purposes of the SDWA and EPA's UIC program. Following that decision, Alabama developed - and EPA approved - a revised UIC program to protect USDWs during the hydraulic fracturing of coalbeds. The Eleventh Circuit ultimately affirmed EPA's approval of Alabama's revised UIC program.

In administering the UIC program, the Agency believes it is sound policy to focus its attention on addressing those wells that pose the greatest risk to USDWs. Since 1999, our focus has been on reducing risk from shallow Class V injection wells. EPA estimates that there are more than 500,000 of these wells throughout the country. The wastes injected into them include, in part, storm water runoff, agricultural effluent, and untreated sanitary wastes. The Agency and States are increasing actions to address these wells in order to make the best use of existing resources.

EPA remains committed to ensuring that drinking water is protected. I look forward to working with Congress to respond to any additional questions, or the concerns that Members of Congress or their constituents may have. If you have further comments or questions, please contact me, or your staff may contact Steven Kinberg of the Office of Congressional and Intergovernmental Relations at (202) 564-5037.

Sincerely,



Benjamin H. Grumbles  
Acting Assistant Administrator

Enclosure

AttachmentEPA Response to Specific Questions Regarding Hydraulic Fracturing

1. **The data presented in the June 2004 EPA study identifies potential harmful effects from the chemicals listed by the Agency in this report. Has the Agency or does the Agency plan to incorporate the results of this study and the fact that these chemicals are present in hydraulic fracturing agents into the Contaminant Candidate List (CCL) development process, and if not, why not?**

Although the EPA CBM study found that certain chemical constituents could be found in some hydraulic fracturing fluids, EPA cannot state categorically that they are contained in all such fluids. Each fracturing procedure may be site specific or basin specific and fluids used may depend on the site geology, the stratigraphy (i.e. type of coal formation), depth of the formation, and the number of coal beds for each fracture operation. The Agency's study did not develop new information related to potential health effects from these chemicals; it merely reported those potential health effects indicated on the Material Safety Data Sheet (MSDS) or other information we obtained from the service companies.

As noted in the final report, "Contaminants on the CCL are known or anticipated to occur in public water systems..." The extent to which the contaminants identified in fracturing fluids are part of the next CCL process will depend upon whether they meet this test.

2. **In the June 2004 EPA study, the Agency concludes that hydraulic fracturing fluids do not contain most of the chemicals identified. This conclusion is based on two items – "conversations with field engineers" and "witnessing three separate fracturing events".**

- a. **How did the agency select particular field engineers with whom to converse on this subject?**

The Agency did not "select" any of the engineers; we talked with the engineers who happened to be present at the field operations. In general those were engineers from the coalbed methane companies and the service companies who conducted the actual hydraulic fracturing. When we scheduled to witness the events, we usually conversed with the production company engineer to arrange the logistics and only spoke with the field engineers from the service companies at the well site.

- b. **Please provide a transcript of the conversations with field engineers, including the companies or consulting firms with which they were affiliated.**

EPA did not prepare a word-for-word transcript of conversations with engineers.



**c. How did the Agency select the three separate fracturing events to witness?**

The events selected were dependent on the location of the fracturing events, the schedules of both EPA OGWDW staff and EPA Regional staff to witness the event, and the preparation time to procure funding and authorization for travel. EPA witnessed the 3 events because the planning and scheduling of these happened to work for all parties. In one event, only EPA HQ staff witnessed the procedure, in another event only EPA Regional staff witnessed it, and in one event, both EPA HQ and Regional staff attended with DOE staff.

**d. Were those events representative of the different site-specific characteristics referenced in the June 2004 study (p. 4-19) as determining factors in the types of hydraulic fracturing fluids that will be used?**

Budget limitations precluded visits to each of the 11 different major coal basins in the U.S. It would have proven to be an expensive and time-consuming process to witness operations in each of these regions. Additionally, even within the same coal basin there are potentially many different types of well configurations, each of which could affect the fracturing plan. EPA believed that witnessing events in 3 very different coal basin settings - Colorado, Kansas, and south western Virginia - would give us an understanding of the practice as conducted in different regions of the country.

**e. Which companies were observed?**

EPA observed a Schlumberger hydraulic fracturing operation in the San Juan basin of Colorado, and Halliburton hydraulic fracturing operations in southwest Virginia and Kansas.

**f. Was prior notice given of the planned witnessing of these events?**

Yes, because it would have been very difficult to witness the events had they not been planned. To plan the visit, EPA needed to have prior knowledge of the drilling operation, the schedule of the drilling, and the scheduling of the services provided by the hydraulic fracturing service company. Wells, in general, take days to drill (in some cases weeks and months depending on depth of the well) and the fracturing may take place at a later date depending on the availability of the service company and other factors beyond anyone's control.

**g. What percentage of the annual number of hydraulic fracturing events that occur in the United States does "3" represent?**

Because of a limited project budget, EPA did not attempt to attend a representative number of hydraulic fracturing events; that would have been beyond the scope of this Phase I investigation. The primary purpose of the site visits was to provide EPA personnel familiarity with the hydraulic fracturing process as applied to coalbed methane wells. The visits served to give EPA staff a working-level, field experience on exactly how well-site operations are

conducted, how the process takes place, the logistics in setting up the operation, and the monitoring and verification conducted by the service companies to assure that the fracturing job was accomplished effectively and safely. EPA understands that thousands of fracturing events take place annually, for both conventional oil and gas operations and for coalbed methane production, and that three events represent an extremely small fraction of that total.

**h. Finally, please explain why the Material Safety Data Sheets for the fluids identified as potentially being used in hydraulic fracturing list component chemicals that the EPA does not believe are present.**

In Table 4-1 of the final study, EPA identified the range of fluids and fluid additives commonly used in hydraulic fracturing. Some of the fluids and fluid additives may contain constituents of potential concern, however, it is important to note that the information presented in the MSDS is for the pure product. Each of the products listed in Table 4-1 is significantly diluted prior to injection. The MSDS information we obtained is not site specific. We reviewed a number of data sheets and we noted that many of them are different, contain different lists of fluids and additives, and thus we concluded in the final report that we cannot say whether one specific chemical, or chemicals, is/are present at every hydraulic fracturing operation.

**3. a. How does the Agency plan to enforce the provisions in the MOU and ensure that its terms are met?**

There is no mechanism to "enforce" a voluntary agreement such as the MOA signed by EPA and the three major service companies. The MOA was signed in good faith by senior managers from the three service companies and the Assistant Administrator for Water, and EPA expects it will be carried out. EPA has written all signers of the MOA and asked if they have implemented the agreement and how will they ensure that diesel fuel is not being used in USDWs. All three have written back to EPA, stating that they have removed diesel from their CBM fracturing fluids when a USDW is involved and intend to implement a plan to ensure that such procedures are met. EPA intends to follow up with the service companies on progress in implementing such plans.

**b. For example, will the Agency conduct independent monitoring of hydraulic fracturing processes in the field to ensure that diesel fuel is not used?**

It is unlikely that EPA will conduct such field monitoring. First, in most oil and gas producing states, and coalbed methane producing states, the State Oil and Gas Agency generally has UIC primary enforcement responsibility, and the state inspectors are the primary field presence for such operations. Second, EPA has a very limited field staff and in most cases they are engaged in carrying out responsibilities related to Class I, III and V wells in states in which they directly implement the UIC program. EPA plans to work with several organizations, including the Ground Water Protection Council and the Independent Petroleum Association of America to determine if there are other smaller companies conducting CBM hydraulic fracturing

with diesel fuel as a constituent and will explore the possibility of including them in the MOA.

**c. Will the Agency require states to monitor for diesel use as part of their Class II programs/?**

Given limited funds for basic national and state UIC program requirements, EPA does not have plans to include the states as parties to the MOA or require them to monitor for diesel fuel in hydraulic fracturing fluids. The State of Alabama's EPA-approved UIC program prohibits the hydraulic fracturing of coalbeds in a manner that allows the movement of contaminants into USDWs at levels exceeding the drinking water MCLs or that may adversely affect the health of persons. Current federal UIC regulations do not expressly address or prohibit the use of diesel fuel in fracturing fluids, but the SDWA and UIC regulations allow States to be more stringent than the federal UIC program.

**4. a. Should the Agency become aware of an unreported return to the use of diesel fuel in hydraulic fracturing by one of the parties to the MOU, what recourse is available to EPA under the terms of the MOU?**

There are no terms in the MOA that would provide EPA a mechanism to take any enforcement action should the Agency become aware of an unreported return to the use of diesel fuel in hydraulic fracturing by one of the parties to the MOA. However, EPA would work closely with the companies to determine why such action occurred and discuss possible termination procedures. The agreement defines how either party can terminate the agreement. EPA would make every effort to work with such a company to maintain their participation in the agreement. EPA entered the agreement with an assumption that the companies would honor the commitments they have made about diesel use in hydraulic fracturing fluids.

**b. What action does the Agency plan to take should such a situation occur?**

If such a situation does happen, and EPA learns that diesel fuel used in hydraulic fracturing fluid may enter a USDW and may present an imminent and substantial threat to public health, EPA may issue orders or initiate litigation as necessary pursuant to SDWA section 1431 to protect public health. Otherwise, EPA would take the actions described under the previous question.

**c. Why did EPA choose to use an MOU as opposed to a regulatory approach to achieve the goal of eliminating diesel fuel in hydraulic fracturing?**

While the report's findings did not point to a significant threat from diesel fuel in hydraulic fracturing fluids, the Agency believed that a precautionary approach was appropriate. EPA chose to work collaboratively with the oil service companies because we thought that such an approach would work quicker, and be more effective than other approaches the Agency might employ (i.e. rulemaking, enforcement orders, etc.). We believed that once the service companies

became familiar with the issue, they would willingly address EPA's concerns. After several months of meetings and negotiations between representatives of the service companies and high-level management in EPA's Office of Water, a Memorandum of Agreement (MOA) was drafted and signed by all parties effective December 24, 2003.

We believe that the MOA mechanism accomplished the intended goal of removing diesel from hydraulic fracturing fluids in a matter of months, whereas proposing a rule to require removal would have taken at least a year or more.

**d. What revisions were made to the June 2004 EPA study between the December 2003 adoption of the MOU and the 2004 release of the study? Which of those changes dealt specifically with the use and effects of diesel fuel in hydraulic fracturing?**

During the specified time-frame, EPA focused on making editorial changes to the report and clarifying information relative to its qualitative discussion of the mitigating effects of dilution, dispersion, adsorption, and biodegradation of residual fluids. With respect to the use and effects of diesel fuel, changes in the study primarily focused on including language in the text of the report which acknowledged that we had successfully negotiated an MOA with the service companies. Specifically, EPA referenced this agreement in the text of the report in the Executive Summary at page ES-2 and on page ES-17, and further discussed the MOA in Chapter 7 in the Conclusions Section of the study.

**e. The Agency also states that it expects that even if diesel were used, a number of factors would decrease the concentration and availability of BTEX. Please elaborate on the data EPA collected and the observations the Agency made in the field that would support the conclusion that 39% of fluids remaining in the ground (1991 Palmer), should they contain BTEX compounds, would not be present in sufficient concentrations to adversely affect underground sources of drinking water.**

EPA reiterates that the 39% figure from the 1991 Palmer paper is only one instance where it has been documented what quantity of the hydraulic fracturing fluids injected into wells will remain behind. Dr. Palmer, who conducted the original research, estimated that coalbed methane production wells flow back a greater percentage of fracturing fluids injected during the process. Where formations are dewatered or produced for a substantial period of time, greater quantities of formation and fracturing fluids would presumably be removed. We used 39% remaining fluids as a "worst case" scenario while doing our qualitative assessment, since it was the only figure we had from research conducted on coalbed methane wells.

With respect to the BTEX compounds, we no longer believe that they are a concern owing to the MOA negotiated between EPA and the three major service companies.

5. Do you plan to conduct a national survey or review to determine whether state Class II programs adequately regulate hydraulic fracturing?

At this time, EPA has no plans to conduct such a survey or review regarding the adequacy of Class II programs in regulating hydraulic fracturing. In its final study design, EPA indicated that it would not begin to evaluate existing state regulations concerning hydraulic fracturing until it decided to do a Phase III investigation. The Agency, however, reserves the right to change its position on this if news information warrants such a change.

6. In light of the Court decision and the Agency's July 2004 response to the Court remand, did the Agency consider establishing national regulations or standards for hydraulic fracturing or minimum requirements for hydraulic fracturing regulations under Class II programs?

When State UIC programs were approved by the Agency- primarily during the early 1980s - there was no Eleventh Circuit Court decision indicating that hydraulic fracturing was within the definition of "underground injection." Prior to *LEAF v. EPA*, EPA had never interpreted the SDWA to cover production practices, such as hydraulic fracturing. After the Court decision in 1997, the Agency began discussions with the State of Alabama on revising their UIC program to include hydraulic fracturing. The net result of that process was the EPA approval of Alabama's revised section 1425 SDWA UIC program to include specific regulations addressing CBM hydraulic fracturing. This approval was signed by the Administrator in December 1999, and published in the *Federal Register* in January 2000.

In light of the Phase I HF study and our conclusion that hydraulic fracturing did not present a significant public health risk, we see no reason at this time to pursue a national hydraulic fracturing regulation to protect USDWs or the public health. It is also relevant that the three major service companies have entered into an agreement with EPA to voluntarily remove diesel fuel from their fracturing fluids.

7. a. If so, please provide a detailed description of your consideration of establishing these regulations or standards and the rationale for not pursuing them.  
 b. Do you plan to establish such regulations or standards in the future?  
 c. If not, what standards will be used as the standard of measurement for compliance for hydraulic fracturing under state Class II programs?

EPA has not explored in any detailed fashion minimum national or state requirements for hydraulic fracturing of CBM wells, except when it evaluated the revised UIC program in Alabama.

Considering and developing national regulations for hydraulic fracturing would involve discussions with numerous stakeholders, the states, and the public and it would require an intensive effort to arrive at regulatory language that could be applied nation-wide. As EPA's

study indicates, coalbeds are located in very distinct geologic settings and the manner in which they are produced for methane gas may be very different in each locale. The proximity of USDWs to the coal formations, and the regional geology and hydrology all play roles in how hydraulic fracturing operations are conducted.

If EPA receives information of drinking water contamination incidents and follow-up investigations point to a problem, EPA would then re-evaluate its decision to not continue with additional study relating to CBM hydraulic fracturing.

Should additional states submit revised UIC programs for EPA's review and approval which include hydraulic fracturing regulations, we would evaluate these programs under the "effectiveness" standards of the SDWA section 1425 as we did for the State of Alabama.

*Question 16.* What is the incremental benefit to public health, quantified wherever possible, over the next 20 years, of the mercury rule that you signed recently as compared to the section 112/MACT approach outlined in the proposed rule?

Response. We determined that the multi-pollutant approach of CAIR and CAMR provides tremendous public health benefits by focusing first on reducing SO<sub>2</sub> and NO<sub>x</sub> while providing via a two phase mandatory emissions cap strong incentives for the further development and installation of mercury-specific technologies starting in 2010. By 2015, the benefits of CAIR and CAMR are \$85 billion to \$100 billion annually.

Under the MACT approach, new and existing facilities would have to meet performance measures to reduce their emissions, usually through installation of control equipment. These kind of approaches often “lock in” specific control technologies that become obsolete over time, while not providing the appropriate incentives for the development and application of more efficient controls. In contrast, under the CAIR/CAMR approach, marketable permits for mercury should lead to technological advances and cost savings as companies meet the declining cap. We fully expect that other countries will be more likely to follow the U.S. lead and take action to reduce mercury emissions from power plants if control technologies are more cost effective. While we are not able to provide you a quantitative estimate of the health benefits of greater international action, such action is essential for addressing the global sources of mercury. This is an important unquantified benefit of a cap-and-trade approach compared to a MACT approach.

*Question 17.* Prior to signing the mercury rule, did you request a briefing or written materials from EPA staff on alternatives to the approach selected in that final rule?

Response. On January 14, 2005, I was briefed on the possible regulatory options for the final CAMR. In attendance at that meeting were the Assistant Administrators from all major EPA program offices: Air; Water; Prevention, Pesticides, and Toxic Substances; Research and Development; Enforcement; and the General Counsel along with members of their staffs. Follow-up meetings were convened several weeks later for the purpose of discussing the modeling results and making final decisions on the proper approach for CAMR. Agency analysis of the alternatives can be found in the rulemaking docket and, in particular, in the Regulatory Impact Analysis.

*Question 18.* If you did request and receive such a briefing or written materials on alternatives to the approach in the final mercury rule, did they indicate that a different approach than the one you selected and signed could produce a greater net benefit to public health?

Response. I received many briefings on benefits and costs including in-depth discussions of alternative approaches. In particular, I was briefed on the relative merits of using a “command-and-control” (MACT) approach versus a market-based cap-and-trade approach. A MACT approach typically would set emission limits per unit of output or throughput, allowing total emissions to grow as the number and size of sources grow. A cap-and-trade approach, on the other hand, sets a hard cap that would insure that emissions would not increase as the economy grows. For any level of compliance cost, the flexibility of a cap-and-trade approach means greater emissions reductions can be achieved than with a less flexible MACT approach. I concluded that the combined approach of CAMR and CAIR provided significant public health benefits and addressed the public health concerns of mercury emissions due to power plants.

When considering the details of a cap-and-trade system, I was briefed on several options, including issuing CAIR alone and varying the level and timing of the caps of CAMR. When we considered more stringent control options, the benefits (in terms of reduced exposure to mercury) were relatively small while the costs increased substantially. This result is due to a number of reasons. For example, control technologies installed to comply with CAIR (scrubbers and SCRs) tend to reduce the mercury that is most likely to deposit in the U.S. Hence it was difficult to discern any significant difference in mercury deposition among more stringent options beyond CAIR and CAMR. Further, the costs of the mercury regulation will get passed on to consumers in the form of higher electricity prices. Increases in electricity prices are highly regressive—lower income families must pay a bigger percentage of their income to these costs. In turn, higher priced energy leaves less available for health care, nutrition, and other important determinants of the quality of life. While these effects are hard to model, it is important to note that more stringent regulation does not always produce greater public health benefits, let alone greater net benefits to society.

*Question 19.* You justified revoking Administrator Browner's decision, which had found that it was "necessary and appropriate" to reduce mercury emissions from each and every electric generating unit using maximum achievable control technology, by indicating that U.S. sources are only a small part of the total global emissions. Should the U.S. be negotiating a binding global treaty to reduce those emissions?

Response. As a more expeditious approach to addressing international sources of mercury, the U.S. proposed a series of public/private partnerships at a meeting of the UNEP Governing Council in Nairobi, Kenya in February, 2005. These partnerships would focus on reducing the major global sources of mercury. Recognizing that a "one size fits all" approach will not work for all mercury sources, the U.S. proposal seeks to bring together industry experts, governments, NGO's and funding organizations to help achieve rapid reductions in sectors such as mining, utilities and the chlor alkali sector. This approach was supported unanimously by the more than 120 countries attending the UNEP meeting.

EPA, working with the Department of State and others, has already started working on these partnerships.

*Question 20.* As the Administrator, will you seek to increase staff/personnel resources for the implementation of the Clean Air Interstate Rule? If so, what would you consider to be an appropriate increase? If not, why not?

Response. Now that the Clean Air Interstate Rule (CAIR) has been promulgated, the Agency's staff is moving into the implementation phase. We have already held a workshop with technical staff from Headquarters and the EPA Regional Offices to discuss the level of resources that will be needed to assist the states and the utility industry to implement the rule. In the near future, we will organize similar workshops with staff from state air pollution control offices. Additionally, EPA staff is meeting with industry associations, as well as individual companies, to explain the regulations and answer their questions. The feedback EPA receives from all of these interactions will allow EPA managers to develop resource needs to fully support the CAIR program.

Clearly, implementation and compliance monitoring of CAIR will require an expenditure of contract monies, as well as staffing needs. I plan to discuss these resource needs with senior EPA managers and ensure that adequate resources are made available either as part of the President's 2007 FY budget request to Congress, or through re-programming of existing Agency resources.

*Question 21.* Prior to signing the Clean Air Interstate Rule, did you review the Agency's public report required to be prepared pursuant to section 102 (C) of the National Environmental Policy Act to accompany the Clear Skies legislation sent up for introduction by request in 2003? This law directs the Agency (or responsible official) to include in every recommendation for legislation significantly affecting the quality of the human environment, a detailed statement on several elements, but specifically on alternatives to the proposed action. Please provide the Committee with a copy of that report.

Response. The Clean Air Interstate Rule was not subject to NEPA section 102(2)(C), pursuant to the statutory exemption for Clean Air Act actions contained in Section 7(c)(1) of the Energy Supply and Environmental Coordination Act of 1973, 15 U.S.C. § 793(c)(1). A legislative environmental impact analysis was not prepared for the President's Clear Skies bill.

*Question 22.* In what year will the Clean Air Interstate Rule and the Clean Air Mercury rule result in a 70 percent reduction of the total national powerplant emissions of each pollutant covered—SO<sub>x</sub>, NO<sub>x</sub>, and mercury? Please provide the specific data or reference to support that projection.

Response. EPA used the Integrated Planning Model (IPM) for projections of SO<sub>2</sub>, NO<sub>x</sub>, and mercury from the power sector under these rules. The cap levels set forth in CAIR and CAMR require a 73 percent reduction in SO<sub>2</sub>, a 61 percent reduction in NO<sub>x</sub>, and a 69 percent reduction in Hg from 2003 levels. For SO<sub>2</sub>, there is a bank of allowances that industry draws down on to reach the emissions cap that has been built up from early reductions that provided benefits to the public at the outset of the Acid Rain Program and near-term early reductions expected before CAIR begins in 2010 thus, EPA projects that the aforementioned emission reduction will be met in 2023. For NO<sub>x</sub>, modeling does not project a significant amount of early reductions or banking for CAIR, so the final reduction will likely be met in 2015. For mercury, the model projects a bank of allowances building up in the earlier years of the program that come from early reductions which are then used at rate in later years that leads to hitting the annual 15 ton emissions cap in 2025.



*Question 23.* Administrator Leavitt informed the Committee that the second phase of the ozone NAAQS implementation rule was to have been completed last summer. Can you provide for the hearing record a commitment for a date certain by which that rule should be promulgated?

Response. Due to the number and complexity of issues arising from the move to the 8-hour ozone standard, and the large volume of public comments received on the proposed implementation rule, EPA decided to break the ozone implementation rule into two phases. EPA issued the first phase of the rule implementing the 8-hour ozone standard in April 2004; we are now working to finalize the Phase 2 rule.

The Phase 2 rule will cover remaining 8-hour implementation issues, such as New Source Review, reasonably available control technology (RACT), modeling and demonstration, and reasonable further progress. The Phase 2 rulemaking was submitted for interagency review on March 7, 2005. I expect to sign the rule once the inter-agency process is complete.

*Question 24.* A significant handicap to replacing ozone depleting compounds such as methyl bromide has been the delay in registering new compounds that can take its place. What can be done to expedite the review and registration of compounds? Can something be done to expedite the review process as well as the familiarization of new compounds by the affected user groups?

Response. Since 1997, EPA has registered a number of chemical/use combinations, which are providing pesticide users many safe and effective alternatives to methyl bromide as quickly as possible. The pesticide/crop combinations include:

- 2000: Phosphine to control insects in stored commodities;
- 2001: Indian Meal Moth Granulosis Virus to control Indian meal moth in stored grains
- 2001: Terrazole to control pathogens in tobacco float beds
- 2001: Telone applied through drip irrigation - all crops
- 2002: Halosulfuron-methyl to control weeds in melons and tomatoes
- 2003: Trifloxysulfuron sodium as an herbicide for tomato transplants in Florida and Georgia
- 2004: Fosthiazate as a pre-plant nematocide for tomatoes
- 2004: Sulfuryl fluoride as a post-harvest fumigant for stored commodities

In addition, EPA has worked to reduce and tailor the pesticide registration data requirements to the extent feasible while still ensuring that the Agency's registration decisions meet Federal safety standards. Furthermore, EPA scientists routinely meet with prospective methyl bromide alternative applicants during the pre-registration process to increase the probability that the data are collected and submitted correctly for the first time, thus minimizing delays. The Agency works with the U.S. Department of Agriculture, pesticide users, and others to keep information updated regarding the phase in of alternatives, pinpointing the areas of greatest need, and ultimately using this information to ensure continued focus on registering methyl bromide alternatives.

*Question 25.* The Montreal Protocol has been an area in which U.S. Government and industry have provided great leadership in implementing substitute technologies. I understand that these technologies are under attack by other countries, with Europe attempting to ban U.S. technologies as part of its climate change regulations, and I also understand that the recent efforts to replace methyl bromide have been slowed because of the Agency's inability to promptly register substitutes. What can you do to assure continued U.S. leadership in this area and the protection of the multi-billion dollar investment made by American industry on this important issue?

Response. I can take several steps to assure continued U.S. leadership in protecting the ozone layer, and to protect investments made by American industry in this important issue. With respect to possible trade concerns with the EU, I intend to remain strongly engaged at the international level, so that we do not allow what has been a scientifically-led process to become a tool of any regional trade policy.

With respect to Methyl Bromide, we need to continue our efforts to register alternatives. Finally, we need to apply the same registration standards to Methyl Bromide, to make sure that we are subjecting this chemical to the same standards required of its ozone-safe alternatives.

*Question 26.* Do you believe that Federal facilities should comply with the same environmental standards and requirements as are imposed on private and non-Federal entities and sources?

Response. Yes. We must also take into consideration other national priorities when advancing environmental protection with regard to federal facilities. It has been EPA's experience that the Nation's environmental goals can nearly always be

achieved in concert with other public and national security values. EPA will continue to work collaboratively with Congress and other federal agencies, states, tribes and other stakeholders toward that end.

*Question 27.* Based on your many years of experience at the Agency, what do you perceive as the top five greatest involuntary environmental health risks faced by the American public?

Response. The American public deserves to have a clean, safe, and healthy environment. Our Nation faces numerous environmental challenges today. However, it is very difficult to rank them by level of risk. Environmental challenges, such as particulate matter, ground-level ozone, and homeland security threats, among others, are all very important. I believe we must continue to use sound science to establish priorities and to improve the ability to measure our environmental progress.

*Question 28.* There is great concern that the Agency may weaken and relax the current rules and schedule to reduce sulfur in diesel fuel. Will you commit to ensuring that the Agency implements and enforces the compliance deadlines and requirements in the Highway Diesel Rule and the Nonroad Diesel Rule as currently written?

Response. The Administration remains committed to full implementation of our highway and non-road rules limiting emissions from diesel engines and fuels. We understand that engine manufacturers have spent considerable time, effort, and financial resources on developing cleaner engines that require the use of the low-sulfur fuel. EPA is working with refiners and pipeline companies to ensure that they can meet our aggressive low-sulfur diesel fuel standards on time and in a manner that not restrict fuel supply, raise prices to consumers, or interfere with the investments made by engine manufacturers.

*Question 29.* Please provide a date certain by which time you will review the state and local government submissions required to be made by December 31, 2004, under the Agency's unauthorized Early Action Compact protocol program and make a determination as to whether the terms and conditions in the protocol have been complied with in each submission.

Response. EPA expects to issue proposed determinations by May 15, 2005, and final determinations by September 30, 2005.

*Question 30.* By what date will you commit to rescinding the "deferred nonattainment designation" status of those Early Action Compact (EAC) areas which have not complied with the terms and conditions of the EAC protocol, as determined by your review in the preceding question?

Response. By September 30, 2005, EPA will rescind the deferred nonattainment designation status of any EAC areas which have not complied with the terms and conditions of the EAC protocol and EPA guidance.

*Question 31.* To date, the Agency has not added any hazardous air pollutants to the list established by Congress in the 1990 Clean Air Act Amendments. Section 112(b)(2) of the Clean Air Act requires the Administrator periodically review that list and, where appropriate, revise that list to add pollutants that present or may present a threat of adverse human health or environmental effects. By what date will you commit to conducting this review?

Response. Adding to and removing pollutants from the list is an ongoing process which involves the review and evaluation of significant amounts of scientific information and is generally carried out through the evaluation of outside petitions to the Agency. EPA reviews these petitions on a pollutant by pollutant basis to determine whether to add or remove the pollutants. Since 1990, the Agency has received 6 complete petitions to delist hazardous air pollutants. Of these, EPA denied one (methanol), approved two (caprolactam and ethylene glycol monobutyl ether), proposed to grant one (methyl ethyl ketone) and is currently reviewing two (methylene diphenyl diisocyanate and methyl isobutyl ketone). EPA is also evaluating two requests to add pollutants to the list (hydrogen sulfide and diesel exhaust) and hopes to make initial decisions on these by the end of the year. Independent from the evaluation of outside petitions, there are data gathering and analysis efforts underway within various parts of the Agency to develop better scientific information on exposures and health impacts of specific pollutants, and to review the list and make recommendations for adding or removing pollutants from it. As these efforts come to fruition, we will propose to modify the pollutant list accordingly.

*Question 32.* Do you believe that it is prudent to take Federal actions that will increase total greenhouse gas emissions?

Response. The prudent course of action at this time is to ensure that the projected growth in greenhouse gases is reduced while also maintaining our economic growth

and improving our energy security. To this end, the Administration has implemented a number of programs that will reduce greenhouse gas emissions and greenhouse gas intensity. At EPA, these programs include EnergySTAR, Climate Leaders, Smartway Transport, and the international Methane to Markets Partnership.

*Question 33.* The Agency has not yet complied with the schedule that it set out to issue a final mobile source air toxics (MSATs) rule. By what date will you commit the Agency to promulgating a final MSATs rule?

Response. The schedule for the proposed and final MSAT rule is the subject of litigation, and EPA is currently in settlement discussions with the litigants. I will inform you of our schedule when it has been resolved in the litigation.

*Question 34.* Is EPA the first federal agency or department to issue guidelines (Guidelines for Carcinogen Risk Assessment EPA/630/P-03/001b) that establish threshold risk level for cancer that would allow the public to be exposed to chemicals that are likely to result in cancer in more than one-in-a-million people and can you assure us that this approach will not compromise public health?

Response. The EPA is the only federal agency to issue guidelines for risk assessment; and has issued guidelines for carcinogen risk assessment since 1976. Since that time, it has been recognized that certain carcinogens may act in a way such that cancer is not caused until a certain toxic level (a threshold) is reached. In the past, several EPA assessments have treated chemicals in this way. Because these chemicals have a threshold for carcinogenicity, the risks at low dose are below one-in-a-million.

The new cancer guidelines (released March 29, 2005) guide the risk assessor to take all of the data that we have available about a chemical into account, and to reflect the data in the choice of model selected, the dose-response chosen, and the risk characterization itself. There has been no section added to the Guidelines or removed that would significantly change the way that potential carcinogens are evaluated.

As always, decisions about the level of protection to the population are a risk management decision made by EPA Program Offices and Regions, and are not a component of the risk assessment that these cancer guidelines address. There is no single agency-wide standard for such risk management decisions. Each must be made based on a specific set of facts consistent with available statutory and regulatory requirements.

*Question 35.* Can you assure us that the use of expert elicitations in the absence of sufficient peer reviewed studies and data will not be used move away from the protective default option of the historically referenced one in a million defeat standard and how much weight will expert elicitations be given in the weight of evidence narratives in deciding carcinogenic risk?

Response. Expert elicitation is a tool that has been widely used for a number of years to help understand the range of expert opinion that exists regarding a specific topic. It has not been widely used in past risk assessments, although there are quite a few recent examples in the peer reviewed literature that demonstrate applications of this tool for risk assessment.

The recently published Guidelines for Carcinogen Risk Assessment discuss expert elicitation as one formalized approach that may be used to help assess the risk of a chemical. The guidelines do not give this approach any more weight than any other in helping to reach conclusions about the carcinogenicity of a chemical, although the guidelines state that working with actual data on a chemical is preferred.

The degree of public protection from a carcinogen to be attained (e.g., a probability of "one chance in a million") is a risk management decision and is not a part of the risk assessment process. Expert elicitation, along with the results of other parts of the risk assessment and the resulting risk characterization, will be provided to risk managers for their decision as to the desired degree of protection.

*Question 36.* In responding to my October 20, 2004, letter, EPA again provided a list of the 34 specific projects ranked by the Agency's National Prioritization Panel for which there were no funds available in fiscal year 2004. Yet EPA failed to provide the specific information requested about the extent of the funding shortfall and its impact on cleanup activities. Without an accurate picture of Superfund's financial needs, Congress cannot have a meaningful discussion about whether to fully fund the program to expedite the cleanup of toxic waste dumps from across the nation. As Administrator, do you commit to providing all of the information requested in the October 20, 2004 letter within a month of being confirmed?

Response. Yes, EPA will provide you with additional information on the 34 Superfund projects ranked by EPA's National Risk Prioritization Panel that were not

funded in FY 2004. Should I be confirmed by the United States Senate, you have my commitment that the information will be provided within a month of my confirmation.

*Question 37.* In your written testimony, you state that the 2002 brownfields legislation “holds the promise to transform thousands of additional sites across the country into usable, productive land.” I am concerned that the promise of this legislation is being undermined by inadequate Presidential budget requests. It is estimated that EPA is forced to turn away more than two-thirds of the applicants for federal brownfields assessment and cleanup funding due to limited funds. The brownfields statute authorizes \$200 million through 2006 for site assessment, remediation and revolving loan funds. Why does the President’s 2006 proposed budget only ask for \$120.5 million and what steps will you take as Administrator to ensure that the brownfields program is fully funded?

*Response.* In FY 2004, EPA’s Brownfields program received \$92.9 million in congressional appropriations for section 104(k) of the Brownfields Act and \$89.3 million in FY 2005. The FY 2006 President’s Budget requests \$120.5 million which is a \$31.2 million increase above the FY 2005 congressionally appropriated funding level. The Brownfields program continues to remain a priority for EPA and is one of the few programs for which increased funding has been requested.

*Question 38.* In your written testimony, you note that “recycling and composting of municipal solid waste has increased more than tenfold in the last decade.” Notwithstanding this statistic, the recycling rates of many consumer commodities, such as plastic, aluminum and glass, are at historic lows. Businesses are finding it increasingly difficult to obtain the quantity and quality of recycled feedstock needed to meet demand. As Administrator, what steps would you take to encourage greater recycling?

*Response.* EPA is aware of the recent difficulties encountered in recycling specific commodities and the Agency is committed to improve the rate of recycling.

EPA is developing Action Plans under the Resource Conservation Challenge which will target selected waste streams in municipal solid waste for special emphasis based on generation and recovery rates and the potential for increased recycling. We identified these waste streams as the most effective focus to help the nation achieve a 35 percent national recycling rate. Specifically, EPA will have a national focus on increased recycling for in three sectors of municipal solid waste: paper, containers and packaging, and organics (including food waste and yard trimmings). These are large sectors of the municipal solid waste stream which that will provide opportunities for increased recycling.

Through these Action Plans, EPA will be providing a national focus by engaging the Agency’s ten Regional Offices in the effort. However, EPA cannot alone increase recycling. It will require collaborative efforts with our primary partners—states, tribes, and local governments—as well as key stakeholders in business and industry and in the environmental community. Businesses, manufacturers, consumers, schools, and all Americans have a role in increasing recycling. EPA’s key role is to engage national stakeholders in broad initiatives.

In addition to the large-volume waste streams for which EPA will design and implement programs which will stimulate and foster increased recycling, the Agency is also committed to increasing the recycling of electronics materials. Although electronics currently does not represent a very large percentage of the municipal solid waste stream, it is growing quickly and poses some unique waste management issues. Just recently, EPA sponsored a National Meeting with various stakeholders interested in electronics recycling. As a result of the meeting, a number of specific activities and actions have been identified for which further work will be undertaken.

*Question 39.* I have heard reports that EPA is considering a proposal to authorize radiation doses to the public of 100 millirem per year, reversing EPA’s longstanding position opposing radiation dose limits over 15 millirem per year. Is this correct? If so, is it correct that EPA has estimated that a 100 millirem per year standard would result in a lifetime risk of 1 cancer incidence in 169 people exposed over a 70-year lifespan, far in excess of EPA’s acceptable risk range?

*Response.* EPA does not plan to weaken its standards for radiation protection. EPA has been working on revising a 44-year old Presidential Guidance to Federal agencies for protection of the public. The current Federal Guidance, as signed by President Eisenhower, includes a cumulative public dose limit of 500 millirems/year, which is equivalent to a cancer risk of 3 in 100 excess cancers over a lifetime. EPA’s main objective in revising the old Federal Guidance is to reduce this excessively high recommended dose limit, to be more realistic in light of the stringent single

source standards that EPA and other Federal agencies have issued. The draft revised Guidance reinforces and strengthens the current public process used by Federal agencies for setting individual source limits. EPA continues to rely on the excess cancer risk range of no more than 1 in 10,000 excess cancers in a lifetime to manage cleanup of radioactive sites.

*Question 40a.* Your testimony states that over 90 percent of the population served by community water systems receives drinking water that meets all health-based standards—up from 79 percent just a decade ago. EPA's supporting data for this statement on the EPA drinking water website contains a notice stating that these measures are based on violations reported by states to EPA's Safe Drinking Water Information System (SDWIS). The notice also states that EPA is aware of inaccuracies and under reporting of some data in this system. The accuracy of SDWIS data is of serious concern. In the District, for example, WASA incorrectly reported that the District was under the 15 ppb lead action level for the 2000 to 2001 monitoring period. This problem of incorrect sampling and reporting also appears to be occurring nationwide. On October 5, 2004, the Washington Post published a story detailing how utilities across the country have manipulated their sampling and monitoring programs to avoid exceeding the action level. What action is EPA taking to address the accuracy of SDWIS data?

Response. The states and EPA have made significant strides in improving data quality since the first data quality assessment was completed in 1999. The data that we receive from states is the most robust set of national data that we have on drinking water compliance. The Agency has worked with states to develop strategies to continue to improve the completeness and accuracy of data and is committing substantial resources to SDWIS/STATE, a database software application designed jointly by EPA and states, which automates calculations and comparisons of utility data to federal and state standards. Additionally, the Agency is increasing the frequency of state data verification audits that are used to assess the quality of data in SDWIS. EPA remains committed to continuing to work with states to improve the quality of the data we use in carrying out our programs and reporting to the public and has in place a joint plan with the Association of State Drinking Water Administrators to address specific data reliability concerns that still exist.

*Question 40b.* How does your statement on drinking water safety reconcile with EPA's recent report on lead contamination in medium and large water systems (January 2005) which shows that over 10.2 million people, since 2000, are served by water systems that exceed the 15 ppb lead action level?

Response. First, it is important to note that an exceedance of the action level is not, in itself, a violation of drinking water standards. A violation is assessed when the utility fails to take the actions required by the regulations related to public education, monitoring, and potentially, lead service line replacement. Our SDWIS data indicate that 2.5 million people were served by utilities that had a violation of treatment technique for the Lead and Copper Rule in FY 2003. Second, although the data posted in January 2005 showed that 10.2 million people were served by systems that had exceeded the action level at some time since January 2000, it is unlikely that the entire population served by those systems were exposed to elevated levels due to the nature of lead in drinking water (e.g. from plumbing, not the source water). For example, in the greater Boston area, monitoring indicated that the action level was only exceeded in fewer than half of the 28 communities served by the water authority. Therefore, the entire service population of more than 2 million did not receive water over the action level. Nevertheless, EPA agrees it is important that all customers of public water systems receive water that meets the lead action level.

*Question 40c.* What is EPA doing to address the 10 percent of the population that is served by community water systems that do not meet all health-based standards?

Response. EPA is committed to working with states that have primary enforcement responsibility for ensuring that utilities meet all health-based drinking water standards. The Agency is providing training and technical assistance to states and utilities to ensure that they understand regulatory requirements and to strengthen their capacity to comply with the regulations. EPA's Regional enforcement staff also works with states to address significant non-compliers, which are those utilities that have persistent violations of drinking water standards.

*Question 41.* The President's budget is proposing to cut the Clean Water Act State Revolving Loan Fund (SRF) by a staggering \$361 million, or by a third, compared to the FY 2005 appropriation of \$1.1 billion. In your testimony before the committee, you remarked that the costs for addressing aging water infrastructure far exceed EPA's budget and are staggering for our cities and communities. What steps will

you take as Administrator to ensure that water infrastructure is a priority and that the problem of combined sewer overflows is addressed?

Response. Water infrastructure is a priority for the Administration and I commit to giving personal attention to this issue. EPA has made a substantial investment in the nation's wastewater systems by helping states establish a permanent source of infrastructure funding. Since 1987, EPA has provided nearly \$23 billion to capitalize the CWSRF—nearly three times the original CWA authorized level of \$8.4 billion.

In FY 2004, the President's Budget presented a long-term plan to address national water infrastructure needs, which included an extension of federal funding of the CWSRF until 2011. The Bush Administration's commitment to provide \$6.8 billion between 2004–2011 represents a \$5.1 billion increase over the commitment of the previous Administration. EPA's FY 2006 request continues to support that long-term plan.

On January 31, 2003, EPA convened a forum on "Closing the Gap: Innovative Solutions for America's Water Infrastructure" to facilitate a dialogue to define the vision and identify a strategy for sustainable infrastructure. As a result of this initiative, the Agency is working in partnership with the states, water utility industry and other stakeholders to ensure sustainability of water and wastewater systems. This includes: promoting water efficient products; promoting actual use costing of water; promoting management techniques for reducing long term costs and improving performance and sustainability; and expanding watershed approaches to identify effective local infrastructure solutions.

The Report to Congress: Impacts and Control of CSOs and SSOs issued on August 26, 2004, presents a comprehensive characterization of CSOs and SSOs, including the extent of environmental and human health impacts caused by CSOs and SSOs, the technologies used by municipalities to address these impacts, and the resources spent by municipalities to control CSO and SSO discharges. The Report finds that there are many existing structural and non-structural technologies that are well-suited for CSO control. We look forward to working with Regions and states to address the findings of the Report. In addition, EPA's 1994 Combined Sewer Overflow Control Policy, codified in the Wet Weather Water Quality Act of 2000, provides flexible guidance to consider the site-specific nature of CSOs and find the most cost-effective way to control them. EPA continues to work with states and CSO communities to develop and implement their long-term control plans, including: characterizing their combined sewer systems; monitoring the impacts of CSOs on waterways; and discussing water quality and CSO control goals with permitting authorities, water quality standards authorities, and rate payers. EPA encourages municipalities to take advantage of opportunities that exist to evaluate water pollution control needs on a watershed management basis and to coordinate CSO control efforts with other point and non-point source control activities.

*Question 42.* You testified, in answer to a question from Senator Carper, as follows, "I will conduct the analysis that has been requested by this Committee, yourself included, if there is agreement on what analysis needs to be done." It is not clear from your testimony whose agreement you are seeking. I ask whether you agree that each legislator, regardless of whether a Chairman of a Congressional Committee, is entitled to request information from the executive agencies (in accordance with the holding of the D.C. Circuit court in *Murphy v. Department of the Army*, 613 F. 2d 1151, 1157 (D.C. Cir. 1979) which concluded "all Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information . . . Each of them participates in the law-making process; each has a voice and a vote in that process; and each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.")?

Response. The Department of Justice's long-standing guidance to all executive agencies is that only the Speaker of the House, the President of the Senate, and the chairman of a committee or subcommittee are entitled to privileged documents exempted under from the Freedom of Information Act. This has also been EPA's long-standing position, fully supported by my Office of General Counsel. That said, I respect your oversight responsibility and I commit to working with you to address your information needs.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR BAUCUS

*Question 1.* Will you visit Libby, Montana as soon as possible after you are confirmed?

Response. I appreciate your invitation to visit Libby, Montana, and I look forward to making the trip as soon as possible if and when I am confirmed. As you stated in your remarks at my confirmation hearing on April 6, visiting Libby will not only help me to better understand the scale of the cleanup challenge at Libby, it will also help members of the community understand that we are committed to solving this environmental problem.

*Question 2.* The Libby community is deeply concerned about the EPA's approach to cleanup and remediation of the former Stimson Lumber mill property in Lincoln County. Lincoln County hopes to use this property as an industrial park and to stimulate economic development. The EPA made a commitment to the community in a workshop that the EPA sponsored several years ago, to stand firm with Libby and support completing the Stimson cleanup in a way that also helps the community use the site in the manner they have proposed. The community is concerned that the EPA is dragging its feet here. Will you look into this situation and report back to me on how the EPA will fulfill its commitment to the community?

Response. EPA will keep its commitments to Libby. EPA has taken a number of steps to assist with the cleanup and the economic redevelopment of the Stimson Lumber mill property. EPA will begin cleanup of the Central Maintenance building at the Stimson Lumber Mill property within the next two weeks (April 18th). This will allow the current and future business tenants to work safely in the Central Maintenance building of the facility.

EPA continues to work with the local authorities to assist with their efforts to stimulate economic development in Libby. Last summer, the Lincoln County Port Authority constructed a motocross track at the Stimson Property for a special event. EPA assisted the Port Authority by taking soil samples in the area to assess risk of exposure to recreational visitors at the track. There were no detectable concentrations of asbestos in any of the soil samples and EPA approved construction of the track. Further, in 2004 EPA established a Cooperative Agreement with the Lincoln County Port Authority, committing \$50,000 to development of site plans and design related to future use of the property.

*Question 3.* The EPA made a commitment to me on two occasions and to Libby community leaders to detail a half time employee in Libby to work on economic development and marketing. This hasn't happened and the people in Libby continue to ask for this. This person could also help the community with creative approaches to leveraging the Brownfields program for economic redevelopment in Libby. Will you follow through on EPA's commitment?

Response. Perhaps there has been some confusion between EPA's commitment to hire a full time construction manager for Libby with the request for a half-time EPA employee to work on economic development issues in the town. EPA has had a full time remedial project manager and his half-time assistant working from EPA's Denver office for several years to support the important work at Libby. Additionally, we are currently in the process of recruiting for a full time project manager who will reside in Libby. We anticipate this position will be filled within 1-2 months. This new employee—on the ground in Libby—would ensure that the clean up activities move at a brisk pace. To the extent he or she has time, discussions with current or prospective businesses regarding the "cleanness" or "safeness" of Libby as a location for economic development would be part of this person's job. EPA Thoroughly reviewed the issue of supporting a half-time employee dedicated to economic redevelopment and marketing in Libby. While EPA has assisted in economic redevelopment within its response authority under CERCLA at Superfund sites and will continue to do so at Libby, funding a position that focuses on marketing related to Libby economic growth or tourism is not within EPA's Superfund authority. Furthermore, EPA's top priority at Libby is to address the human health and environmental threat by minimizing exposure to Libby asbestos contamination at existing residences and other commercial properties.

*Question 4.* Lincoln County officials and I have been pressing the EPA to work with us to develop a proactive plan to address what to do with buildings and homes that cost more to clean, than to tear down and replace with new structures. It is my understanding that the EPA has some latitude and discretion here but will not exercise its discretion. I believe this would require some out-of-the box thinking on EPA's part, but the folks in Lincoln County and me (and the taxpayers) are concerned by the mounting cleanup costs, and the fact that EPA will often spend \$80,000 to \$100,000 or more to clean a home worth only \$30,000. Will you look into this situation and report back to me with proposals as to how EPA can take a different approach here?

Response. I also believe that Superfund cleanups should be protective of human health and the environment and be cost-effective and efficient. It is my understanding that the average cost of cleanup at a residential home in Libby is now \$30,000.

The costs involved in demolition and replacement of any residence or commercial property in Libby are considerably more than \$30,000. The costs associated with the construction process include the demolition itself, disposal of the debris, and restoration of the property to a suitable condition to rebuild. Other government costs include temporary relocation assistance, personal property storage payments, and the cost of fair market or replacement value for the demolished structure. In order for the government to approve of this process, these combined costs must be less than the cost of cleanup of a particular residence. In most cases, the cost of demolition and then rebuilding far exceeds the cost of cleanup.

EPA's plans to demolish several structures in Libby are the result of extensive research, engineering evaluation and planning, which concluded that the work would be cost-effective. The properties included in these plans have unique factors related to the structural integrity of the buildings, or to the level of contamination within a particular home.

*Question 5.* In general, how will you manage the Superfund program as Administrator and how will you ensure that priority Superfund sites around the country, particularly Libby, Montana, continue to receive adequate funding to protect the public's health and welfare given the funding constraints the program is now facing due to an empty Superfund Trust Fund?

Response. Superfund program appropriations have remained relatively steady over the past 5 fiscal years and EPA's FY 2006 budget request maintains steady funding.

I will continue to have the Superfund program supplement its appropriated funding by regularly reviewing Superfund contracts and other funding mechanisms to determine whether unspent resources are available for use in the current fiscal year. Over the past 4 fiscal years, EPA has de-obligated more than \$500 million in this manner to fund new construction projects.

EPA obligated \$256 million of FY 2004 appropriations for Superfund cleanup construction. Nearly \$195 million of these resources were used to fund ongoing projects like Libby, Montana. In FY 2004, EPA conducted a total of 678 on-going cleanup projects at 428 sites (this includes EPA lead, PRP lead, and federal facility sites). I can assure you that EPA will continue to protect human health and the environment by cleaning up hazardous waste sites and Libby, Montana will continue to be one of EPA's top cleanup priorities.

*Question 6.* As you know, Montana (along with many other states) is experiencing an exploding methamphetamine epidemic. One of the side-effects of meth production is the toxic chemicals it leaves behind, posing a direct threat to public health and safety. Funds to clean-up these mini toxic waste sites are hard to come-by. Please tell me your thoughts on how we might leverage the Brownfields program to clean-up some of these sites, for instance by developing a pilot program within the larger Brownfields program.

Response. The assessment and cleanup of methamphetamine labs are among the statutory eligible uses of brownfields funding. To date, EPA has seen a very small number of applications by localities for the brownfields competitive grant program for assessment and cleanup of these properties. However, our state and tribal grant program under section 128 of the Brownfields Law has seen several states applying for and receiving funding to address outreach, education and assessment of these types of properties for local entities. Examples of states addressing these issues include Kansas, Missouri and Minnesota.

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RESPONSE OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR LIEBERMAN

*Question 1a.* You commented in your testimony today and in recent meetings with staff and with members of this Committee that you fully support the use of the best science to make Agency decisions, and that Agency decisions require an "open and transparent decision-making process." Yet the EPA has been criticized recently by GAO and EPA's own Inspector General, who concluded that EPA did not conduct appropriate cost-benefit analysis of its proposed mercury rule, and appeared to choose its reduction target based on the levels the President proposed in his Clear Skies Initiative, not based on the technology review required by the Clean Air Act.



Does your principle of applying the best science apply retroactively to decisions made before your confirmation?

Response. The CAMR represents the first time that the federal government, or any nation, has regulated mercury emissions from the fleet of power plants. I am proud of this. The CAMR rulemaking process was one of the most rigorous and thorough in EPA's history. This level of rigor was appropriate given the importance of the decision and the great deal of public interest in the issue. Claims that the process and our review of the science were anything less than rigorous or comprehensive are simply untrue.

Science inquiry is an iterative process and is always evolving. Regulatory decisions, however, must be made based on the best information at a given point in time. We will continue advancing and monitoring the science in this important field and, if future information warrants, I am committed to taking additional appropriate action.

*Question 1b.* Do you believe that we will have mercury-specific control technology available in this country before 2018?

Response. I have listened carefully to many different experts on the topic of the availability of mercury-specific control technologies. EPA's Office of Research and Development wrote a White Paper—Control of Mercury Emissions from Coal-Fired Electric Utility Boilers: An Update (March 2005)—that details the information on tests and explains their professional judgment about the future availability of technology. The white paper states:

As discussed in this document, since the release of the earlier White Paper, additional data, mostly from short-term tests, have become available on mercury control approaches for power plants. Also, a broad and aggressive RD&D program is underway, which will yield experience and data in the next few years. Accordingly, ORD continues to believe that PAC injection and enhanced multipollutant controls will be available after 2010 for commercial application on most, if not all, key combinations of coal type and control technology to provide mercury removal levels between 60 and 90 percent. However, considering the progress made with halogenated PAC sorbents and other chemical injection approaches, it is now believed that optimized multipollutant controls may be available in the 2010–2015 timeframe for commercial application on most, if not all, key combinations of coal type and control technology to provide mercury removal levels between 90 and 95 percent. Such optimized controls could include less expensive use of sorbent (PAC or halogenated PAC) injection with enhanced SCR and/or enhanced FGD systems. See page 29 of <http://www.epa.gov/ttn/atw/utility/ord—whtpaper—hgcontroltech—oar-2002-0056-6141.pdf>

This paper was a part of the Agency's CAMR rulemaking (and is available in the docket). Based on this information, I believe that mercury-specific control technologies will be available for many power plants in advance of the 2018 phase II cap. The economic incentives inherent in the two-phase cap-and-trade program finalized in the CAMR will serve to advance the technologies such that they are widely available for use in complying with the Phase II cap.

*Question 1c.* Members of my staff have had conversations with vendors who have indicated that control technology is available today, and will soon be applied in many states that have more stringent mercury standards than the federal Clean Air Mercury Rule. Why does the mercury rule require no real reductions until 2018 if technology will be available much sooner?

Response. Substantial reductions will take place in 2010. The final CAMR that I signed dovetails with CAIR and together these two rules provide for a flexible, multipollutant approach to reducing SO<sub>2</sub>, NO<sub>x</sub>, and mercury from the power sector. These two rules provide strong incentives for the installation of a large number of scrubbers and SCRs that will reduce SO<sub>2</sub> and NO<sub>x</sub>, respectively, and will also reduce mercury emissions, particularly the types of mercury that matter most for reducing U.S. deposition.

This approach provides significant public health benefits by focusing on reducing SO<sub>2</sub> and NO<sub>x</sub> while providing strong incentives for the further development and installation of mercury-specific technologies starting in 2010, well in advance of 2018. We expect that this approach will lead to the development of less costly technologies for reducing mercury emissions.

*Question 1d.* Will you apply the principles of the “best science” to the mercury rule by re-evaluating the proposed rule in light of the reports that a Harvard study funded by EPA itself, a study that found estimated health benefits from mercury control considerably greater than those the Agency has publicly claimed, was ignored in development of the rule, despite indications that EPA received the results of the study by its stated January deadline?

Response. On March 24, 2005, I received a letter from Senators Leahy, Boxer, Jeffords, and Kerry that asked the same question. Please find my attached response, which was sent on April 5, 2005.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

The Honorable Patrick Leahy  
United States Senate  
433 Russell Senate Office Building  
Washington, DC 20510-1004

Dear Senator Leahy:

Thank you for your March 24, 2005 letter regarding EPA's analyses supporting the Clean Air Mercury Rule (CAMR). The Agency recognizes that mercury is a toxic metal that can be harmful to human health and takes its responsibility to protect human health and the environment very seriously.

I appreciate this opportunity to explain EPA's use of science in the development of the CAMR and to clear up the misperception that if EPA only would regulate power plant emissions more strictly, exposure to the population would be significantly reduced.

The CAMR rule-development process was rigorous and included multiple opportunities for public input throughout, including following the proposal, the supplemental proposal, and the notice of data availability. Over the entire rule-development process, the public had eleven months to submit comments before the final comment period closed on January 3, 2005. To imply that EPA's process was closed and that the Agency omitted consideration of a "key piece of analysis" in order to "maintain its story line" is both troubling and untrue. The Northeast States for Coordinated Air Use Management (NESCAUM) report that you refer to in your letter was submitted to the docket on February 22, 2005 – only a few weeks before the Agency was required to sign a final CAMR and almost two months after the comment-submission deadline of January 3, 2005.

Well before the rulemaking deadline, EPA requested that the NESCAUM and Harvard researchers share the report with the Agency. EPA staff were briefed by one of the report authors in late August 2004 on some of the approaches the report authors were considering and on January 3, 2005, received a brief summary of NESCAUM's forthcoming report. However, the submitted summary comments did not contain sufficient detail on the report's final methodology or results for EPA to rely on the information in the rulemaking. More importantly, EPA's review of these preliminary documents led the Agency to determine that the NESCAUM approach did not raise new issues not previously considered by the Agency that would be material to the rule.

In response to your inquiry, I asked EPA's experts to take a close look at the NESCAUM report. Their review of the full report only reinforces our assessment of the preliminary materials. Having been briefed on the report, I assure you that, had the report been submitted in a timely manner, our analysis of the CAMR would not have changed in any material way.

EPA's analyses supporting the CAMR represent Agency experts' best effort to evaluate the science, develop causal relationships, and estimate the benefits of the rule. Based upon our current understanding of the science, reduction in deposition of mercury emissions from power plants may reduce exposure to consumers of fish from freshwater ecosystems and we can approximate that response by assuming a linear relationship between deposition and methylmercury in freshwater fish. However, the evidence does not support the application of this linear relationship to marine environments. The importance of this point cannot be understated because marine and ocean fish account for the greatest source of methylmercury exposure in the United States. As such, our analyses to support the CAMR quantify the neurological health benefits to children as a result of this rule based on reduced *in utero* exposure to mercury from freshwater, recreationally-caught fish. EPA considered all potential benefits, even those we concluded could not or should not be quantified (e.g. cardiovascular effects and reduction in marine fish concentrations). These non-quantified benefits are one of the reasons the Agency has promulgated a final mercury rule with quantified costs far greater than quantified benefits.

The CAMR was based on a thorough analysis of the science. The literature on the health effects of mercury is well-known to the scientific and social science communities. The NESCAUM report presents the same underlying science that the agency has spent years reviewing and upon which the CAMR is based. The NESCAUM report does not present any new scientific research on the health effects of mercury in humans. It is simply another analysis of existing literature, the body of which is well-known to scientists in the field. In addition, the NESCAUM report evaluates emission reduction requirements similar to those we adopted in the CAMR. It simply suggests that the benefits of the CAMR may be greater than EPA estimated.

During my recent briefing, EPA experts identified several key places where the approach to quantification of benefits taken by NESCAUM differs from the approach determined by EPA to be appropriate for consideration in a regulatory context.

First, EPA quantified reductions in methylmercury concentrations in freshwater fish but concluded that the science of mercury cycling in marine systems is not sufficiently advanced to allow for a meaningful quantification of this exposure pathway. The NESCAUM report also recognized that the simplified proportional relationship assumed between the reduction in mercury emissions and the reduction in methylmercury concentration in freshwater fish may not hold for marine environments, noting that:

Methylmercury concentrations in yellow fin tuna caught between 1971 and 1998 do not appear to have changed over time despite significant increases in surface water mercury concentrations in the area where these fish were caught (Kraepiel et al., 2003). Clearly, if these data reflect a general trend our estimates of changes in methylmercury intake rates in the general population may be biased upward *and the possibility exists that there may be no change in marine fish ethylmercury concentrations as a result of mercury emissions controls.* (Emphasis added)

Nonetheless, despite these reservations, the NESCAUM report quantifies this exposure pathway using assumptions that EPA experts believe are not supported by the literature, likely leading to a significant overestimate of benefits from reduced power plant emissions.

Second, EPA, looking at the same studies considered in the NESCAUM report, also performed a careful, comprehensive qualitative assessment of the cardiovascular risk of methylmercury exposure. EPA concluded for several reasons that a quantitative assessment was not appropriate. The NESCAUM report contains a similar qualitative assessment of the literature and it is clear that the researchers who wrote the NESCAUM report shared EPA's concerns about the uncertainty of quantifying cardiovascular benefits, noting that:

When compared to the body of epidemiologic data indicating that fish consumption may reduce the risk of myocardial events (e.g., Daviglus et al., 1997), the epidemiologic studies showing an association between methylmercury exposures and cardiovascular effects are comprised of a relatively small number of subjects and only three independent cohorts.

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Whether there is an increased cardiovascular risk associated with methylmercury exposures is not clear at this time. *Thus, we recommend that the predicted benefits associated with premature mortality and non-fatal myocardial infarction be viewed with caution.* (Emphasis added)

We strongly agree with the report conclusions that these estimates should be "viewed with caution." While the standard for inclusion of monetary estimates in an exploratory report is much lower than what would be appropriate for a regulatory support document, given the NESCAUM Report's conclusion about cardiovascular benefits, a fair presentation should provide a quantitative analysis of the uncertainty in the benefit estimates. The NESCAUM report does not do so.

Third, EPA commissioned Harvard researchers Dr. Louise Ryan and Dr. David Bellinger to perform an integrated analysis of the three major epidemiological studies of methylmercury exposure and used the relationship between exposure and neurological effects identified in that analysis to calculate benefits for the CAMR. This use of an integrated analysis is consistent with the advice provided by the National Academy of Science's National Research Council. In its 2000 report titled *Toxicological Effects of Methylmercury*, which concluded that all three studies were useful and recommended that findings from all three be considered when evaluating methylmercury exposure. However, NESCAUM relied in part on a relationship identified in an unpublished study that would lead to much higher quantified neurological benefits than the relationship identified by Dr. Ryan and Dr. Bellinger. The unpublished study used by NESCAUM was not identified in the report's references or submitted to the docket with the report so we have not had an opportunity to review it.

Fourth, EPA's estimates of the benefits of the CAMR are appropriately understood by viewing both the quantified benefits and the qualitative discussion. NESCAUM quantified additional possible routes of exposure and possible health endpoints. As acknowledged by the NESCAUM report, these estimates are more uncertain. It should also be made clear, however, that the estimates are also less likely to represent real benefits and that the real benefits of the rule are likely to be far less than NESCAUM estimates.

Fifth, EPA accounted for the timeframe under which reduced mercury emissions would likely lead to reduced exposure to methylmercury. Adjusting for the timing of costs and benefits is standard practice. It does not appear that NESCAUM took this issue into account. EPA staff suggest that this omission leads to the benefits in the NESCAUM report being overstated, in addition to the other issues identified above, by a factor of two or more.

Finally, EPA performed an analysis of incremental costs and benefits to understand the advantages and disadvantages of pursuing more or less stringent utility mercury emission limits. NESCAUM focused on total benefits for emissions reductions similar to those required in the basic rule adopted by EPA. It is misleading to focus only on total benefits since there are diminishing returns associated with reductions beyond EPA's Clean Air Interstate Rule. An incremental analysis allowed EPA to compare alternative mercury-specific policies.

The CAMR trading approach is forward-looking. The flexibility of allowance trading creates financial incentives for coal-fired power plants to look for new and low-cost ways to reduce emissions and improve the effectiveness of pollution control equipment. We believe that staying the CAMR will only delay this progress.

Ultimately, we must recognize that the CAMR cannot provide a quick fix to the problem of mercury exposure since U.S. power plants contribute less than one percent of global mercury emissions each year and since marine and ocean fish account for the greatest source of methylmercury in the United States. EPA also recognizes that fish and shellfish are an important part of a healthy diet. The best way for women of childbearing age, pregnant and nursing mothers and young children to realize the benefits of eating fish and shellfish and be confident that they have reduced their exposure to the harmful effects of mercury is to follow the EPA-FDA Fish Advisory issued last year. EPA will continue to monitor scientific developments in the understanding of mercury, as well as continue its own efforts to advance the state of the science on mercury. Implementation of EPA's CAMR will not prevent this progress.

During the 1990's, the Agency was repeatedly sued for its slow pace in addressing mercury emissions from power plants. The Bush Administration is not advocating further delay to study the problem but is starting the effort to reduce emissions now while continuing to learn more. To the extent that new information warrants, EPA is committed to taking appropriate action consistent with that information. The protective and environmentally responsible time to act to control mercury emissions from power plants is now.

Sincerely,



Stephen L. Johnson  
Acting Administrator

*Question 1e.* What are your specific plans for addressing the shortcomings identified by the GAO and the EPA Inspector General regarding regulation of mercury?

Response. The CAMR rulemaking process consisted of a proposed rule, a supplemental proposed rule, a public comment period in both proposals, an extension of the comment period, and solicitation of public comment on a Notice of Data Availability. The IG characterized the process as incomplete before the process was completed.

The GAO report encouraged EPA to pursue additional economic analysis. We agreed and, in fact, were already in the process of finalizing a number of the analyses the GAO report requested or cited as informative. These analyses are part of the supporting documents for the final CAIR and CAMR.

*Question 2.* According to the National Academy of Sciences report from June 2001, a report requested by the Bush White House:

“Greenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising. The changes observed over the last several decades are likely mostly due to human activities, but we cannot rule out that some significant part of these changes are also a reflection of natural variability.”

Do you agree that global warming is occurring? Do you agree that the 1990s were the hottest decade on record? Do you agree that a significant portion of the warming that has occurred over the last 50 years is due to human activity? Even if there are uncertainties about the precise impacts from continued emissions growth, isn’t it dangerous to let CO<sub>2</sub> concentrations keep rising to levels that have not been seen in the history of the human race? Are you aware that the administration’s voluntary “goal” for CO<sub>2</sub> emissions would allow emissions to continue rising by 14 percent over the next decade?

Response. Like the President, I agree with the findings of the National Academy of Sciences report. I also agree that we need to take steps to reduce the projected growth in emissions of greenhouse gases like CO<sub>2</sub>. We need to develop and implement ways of reducing greenhouse gas emissions that will also maintain the strength of our economy, and we are taking strong steps to confront this long-term challenge. The President has proposed a program to address both the technological and scientific challenges we confront as well as a series of immediate actions to reduce greenhouse gas emissions in the United States and abroad. I believe that these actions—which at EPA focus on programs like Energy STAR, Smartway Transport, Climate Leaders and the international Methane to Markets Partnership—are a strong and effective response to the challenge we face.

*Question 3.* There are concerns in the scientific community that our current lead exposure standard is not sufficiently protective, particularly with regard to children. What are your plans for having the Agency review the science and making a determination as to whether updated, stricter standards are needed?

Response. Reducing exposure to lead has been an important issue for EPA for more than two decades. While the hazard standards are a critical part of EPA’s lead poisoning prevention program, they are most effective as part of the Agency’s broader program designed to educate the public and raise public awareness of the health effects of lead. The hazard standards are based on a thorough review of the best science that was available to the Agency at the time the standards were issued in 2001. EPA recognizes, however, that the science is constantly developing and with it our understanding of the relationship between exposure and health impacts. At such time as new data become available, the Agency will consider changing the standards to reflect these data.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR BOXER

*Question 1a.* Mr. Johnson, the trade publication Inside EPA has on its web site a copy of a study authored by EPA’s water office examining the cardiovascular benefits of utility mercury controls “Benefits of Reducing Mercury in Saltwater Ecosystems.” Notably, that study was not made available to the public at any time before you signed the power plant mercury rule—including during the public comment period in December 2004 when EPA specifically requested comment on the cardiovascular impacts of mercury from power plants. Indeed, EPA still has not made it publicly available, as far as I am aware, and its findings were never discussed in the final rule.

This agency study appears to be in line with the Harvard study that EPA refused to take in account or discuss in its final rule. The water office study “concludes that

reducing mercury by 30 percent would create \$541 million in benefits in the Southeastern U.S. from improved cardiovascular health in humans and mercury reductions in marine fish and shellfish. The study consistently found that 85 percent of total benefits could be ascribed to reductions in cardiovascular disease, with the remainder made up by IQ improvements, for a total annual benefit of \$600 million.” “EPA Study Backs Rejected Harvard Effort On Mercury Control Benefits,” Risk Policy Report Daily News—Thursday, March 31, 2005. In view of your statements on basing policy on sound science, it is surprising that this was suppressed and not considered. Please explain your rationale for not including or considering this study in the course of the mercury rulemaking?

Response. The Office of Water report is a case study to focus attention on data and knowledge gaps and suggest areas for research priorities to address those uncertainties. The final CAMR rulemaking considered the same underlying science but did not rely on the results of the Office of Water study because the study is undergoing internal review and has not undergone external peer review. The Agency also has concerns with the large uncertainties surrounding the study’s quantitative estimates and assumptions made by the study.

*Question 1b.* Will you make this study available to this Committee and include it in the final rulemaking docket for the power plant rule? And since EPA does not have the excuse that this study was “too late” to be considered by the agency, as you have claimed about the Harvard study, why was this study not made available for comment and review during the public comment period and before you signed the final power plant rule?

Response. As described above, the Office of Water case study is undergoing internal peer review but has not undergone any external peer review. When the document has been peer reviewed and is final, we will make it public and share it with the Committee. In the final rulemaking for CAMR, we relied on the same underlying science as was used in the Office of Water case study. The Agency’s benefit methodology, including peer reviewed case studies, are described in detail in the supporting documents for the final rule. We took comment on our benefits methodology in the proposal and further in the Notice of Data Availability.

*Question 2a.* Mr. Johnson, were you aware that EPA staff were attempting to meet with outside cardiovascular researchers and experts in January of this year while the power plant mercury rule was being developed? According to EPA sources, political appointees at the agency prevented that meeting from taking place before you signed the rule. Can tell us why this was done? Do you believe that meeting with experts on the cardiovascular effects of mercury was relevant to the rulemaking and the decision to exclude the NESCAUM study?

Response. Over the past year, Agency staff and managers were briefed by several of the leading cardiology researchers on the studies looking at the potential cardiovascular impacts of mercury exposure. The Agency carefully reviewed the peer-reviewed literature. A detailed discussion of that literature can be found in the Regulatory Impact Analysis supporting the rule.

I was aware that Agency scientists were exploring options for initiating a meeting among relevant federal agencies that would include presentations from and panel sessions including individuals outside the federal government. The scientists were planning to hold the meeting after the close of the comment period. I was concerned that holding the meeting at such a late stage in the rulemaking process and after the close of the comment period would have greatly jeopardized the Agency’s ability to issue the final rule in accordance with its legal deadline and the requirements of the Administrative Procedures Act.

As I said in my oral testimony before the Committee in April, and the Agency said in the preamble to the final CAMR, EPA will continue to monitor and advance scientific developments in the understanding of mercury, and if new evidence warrants, EPA is committed to reevaluating the CAMR. I look forward to having our scientists work with other applicable agencies, especially FDA, to continue to look at the issue of the health impacts of methylmercury exposure.

*Question 2b.* Will you commit to making available to EPW Committee staff all EPA staff involved with the question of cardiovascular harms from mercury, the Harvard study, the EPA water office study, and the cancelled meeting with cardiovascular experts so that Congress can get to the bottom of this important public health matter?

Response. I would be happy to work with the Committee to schedule a meeting on this important issue. As always, we stand ready to provide the Committee with an opportunity to talk with the Agency’s lead experts on issues before the Committee.



*Question 2c.* Will you commit to providing to this Committee all EPA documents, including emails, discussing these same issues and the planned meeting, as well as a list of the planned and invited participants?

Response. However, I understand and respect the oversight role over the Environmental Protection Agency and I will commit to respond fully to oversight requests by the Chairman on behalf of the Committee. Most of the information specifically requested here are internal deliberative communications and hence privileged.

*Question 3.* Mr. Johnson, as you know, the Clean Air Act required EPA to make a finding as to whether mercury and other air toxics emitted from power plants should be regulated as “hazardous air pollutants”. EPA found that they should. However, in your mercury rule, you overturn this finding, without justification or the required notice or comment. This action ensured that mercury would not be controlled in three years in the most protective fashion using state of the art controls, called “Maximum Achievable Control Technology”, as is required by law. It is worth pointing out that is how mercury is controlled when emitted from a variety of other of sources, including incinerators.

You have been asked by me and some of my fellow Senators and members of the public to “stay”—or put on hold—this decision. Will you commit to “staying” EPA’s March 29th mercury “rescission” and delisting rulemaking while judicial review of this rule takes place, and commit to going back and considering all the benefits of regulating power plant mercury pollution more quickly and more rigorously?

Response. Before I respond to your specific question concerning mercury and the recently promulgated Clean Air Mercury Rule (CAMR), I want to make sure that the Agency has been clear about the nature and sources of risk from mercury. We are exposed to methyl mercury through the fish we eat. Reduction of emissions from U.S. power plants may affect local freshwater ecosystems, but will not significantly reduce ocean concentrations. The importance of this point cannot be understated because the vast majority of fish and shellfish Americans consume come from ocean waters, and only a small portion of fish and shellfish consumed are freshwater recreationally caught fish. To suggest that there is a quick fix to the mercury problem in the U.S. would be misleading. EPA continues to recognize that fish and shellfish are part of a well-balanced diet that can contribute to heart health and children’s proper growth and development. The best way for women of childbearing age, pregnant and nursing mothers, and young children to realize the benefits of eating fish and shellfish and be confident that they have reduced their exposure to the harmful effects of mercury is to follow the EPA–FDA Fish Advisory issued last year.

The CAMR represents the first time that the federal government, or any nation, has regulated mercury emissions from the fleet of power plants. I am very proud of this. The CAMR rulemaking process was one of the most rigorous and thorough in EPA’s history. This level of rigor was appropriate given the importance of the decision and the great deal of public interest in the issue. Claims that the process and our review of the science were anything less than rigorous or comprehensive are simply untrue.

Since we finalized the rule, we have received at least one administrative stay request and have been sued in the U.S. Court of Appeals for the District of Columbia Circuit. Several groups have also informed us that they intend to file administrative reconsideration petitions. Until the Agency has had an opportunity to review all of this material, it would be inappropriate and premature for me to commit to a particular action. That said, I have several concerns with staying the rule. First, I believe the CAMR rule is valid—legally, scientifically, and as a matter of policy. Second, staying the rule would leave mercury unregulated. Even if one believes that our final rule should have been more stringent, that belief would not justify staying the rule. As EPA said in the preamble to the final rule, if future information demonstrates that additional control is warranted, EPA is committed to reopening and reevaluating the CAMR standards. Finally, EPA was legally obligated to finalize the CAMR by March 15, 2005. A stay of the rule would raise questions as to whether we met our legal obligations.

*Question 4.* Mr. Johnson, please provide the most current TRI data on mercury.

Response. The most recent TRI data can be found at <http://www.epa.gov/tri/>. For your information, the Agency relied in large part on the National Emissions Inventory (NEI), not the Toxics Release Inventory (TRI) you reference in the CAMR rulemaking for a variety of reasons. For one, the NEI incorporates information from the 1999 Information Collection Request (ICR) data, the only test data for a large number of utility units employing a variety of control technologies currently available to the Agency. The most recent released NEI is for 1999 (found at <http://www.epa.gov/ttn/chief/net/1999inventory.html>) and we are currently reviewing the 2002 NEI, which we expect to release later this year.

*Question 5.* At this year's budget hearing, I asked you to provide me with a list of sites ready for Superfund clean-ups in priority order. You had said you would provide it. This commitment was also made by Acting Assistant Administrator Tom Dunn. Mr. Dunn informed my staff that the most current list, which I understand is subject to change, would be provided. Despite these commitments, to date the EPA has not provided this information. This information is critical and especially timely, as the appropriations process has already begun and communities and families are dependent on this funding for securing their health and safety. More importantly, our communities and families have a right to know whether their government intends on meeting its obligations. Can you commit to me today, that you will provide this list to me by the end of the week, if not sooner?

Response. EPA is still in the process of making final funding decisions for new cleanup projects in fiscal year 2005. Final funding decisions for new construction starts are not expected until September of this year. I can assure you that when the final new construction start information is available, we will transmit the information to the committee. It is my understanding that the list of construction starts in fiscal year 2004 was sent to you pursuant to the commitment made during the recent budget hearing.

There are a number of dynamic factors which affect the funding decision-making process for new construction starts. For example, EPA does not yet know the total amount of money that may become available through deobligations. Also, in some cases, delays in the remedial design or other site specific circumstances will result in a site not being ready for construction during this fiscal year.

All Superfund remedial action funding decisions are made in close coordination with EPA regional offices after a careful review of each project. These discussions result in a better understanding of the project schedule, type of project activities, and when in the fiscal year estimated funding requests would be needed.

*Question 6.* My understanding is that the EPA has prepared a document describing and listing which Superfund sites present a direct and immediate threat to human health. A version of this document was leaked to the press, which is how I came to learn of its existence. Because peoples' very health and lives are at stake, this information is of utmost importance. Will you commit to me today to making any similar documents and related information available to me immediately?

Response. I understand that in response to your request at EPA's recent budget hearing, EPA provided your office with the list of Superfund new construction projects that did not receive funding in FY 2004. I am not familiar with the specific document you are describing in your question.

EPA is still in the process of making final funding decisions for new cleanup projects in Fiscal Year 2005. Final funding decisions for new construction starts are not expected until September of this year. I can assure you that when the final new construction start information is available, we will transmit the information to the Committee.

*Question 7.* We have spoken before about the need for better communications and more openness from your Agency. I want to confirm with you now, that if I need to call your office and ask for information, I will get responses promptly and fully. This information is essential to Congress' oversight role. Will you again pledge to improve this vital communications link and be responsive and prompt with me and all other Members?

Response. Yes, EPA will strive to communicate information in an effective, timely manner with all members of Congress and Congressional Committees.

*Question 8.* Given the Superfund program's serious funding problems, will the Administration support reauthorization of the Superfund taxes paid by polluters? If not, how will you ensure that funding shortfalls for cleanups are met?

Response. I strongly support and enforce the "polluter pays principle" under the Superfund law. The success of the polluter pays principle is illustrated by the fact that roughly 70 percent of Superfund sites are cleaned up by the parties responsible for hazardous waste, an average of \$838 million per year to clean sites as mandated by EPA. A broader perspective shows that, over the history of the program, EPA has required responsible parties to spend more than \$21 billion on cleaning up contaminated properties.

EPA has always relied upon Congress to appropriate funds for the Agency to pay for cleanups at Superfund sites. Superfund program appropriations have remained relatively steady over the past 5 fiscal years at \$1.3 billion to \$1.5 billion. The FY 2006 President's Budget Request continues to maintain steady funding for the program.

The Agency is making significant progress in cleaning up Superfund sites. Unlike in previous years where smaller, less costly sites were targeted for cleanups, we are now addressing large and complex sites that present unique clean-up challenges. Cleaning up these sites requires a disproportionate share of Superfund money. I can assure you however, that new projects that are not funded have been secured, often have had prior cleanup work and pose no immediate threat. EPA will not put communities at risk and will continue to protect human health and the environment.

*Question 9.* As you know, there are many critically important Superfund sites across America that are underfunded and not being cleaned up. Yet families and communities are expecting their government to keep its promise and remediate these areas. What efforts is the EPA making to give notice to communities that their clean-ups are being delayed due to underfunding?

Response. The Superfund program has the most extensive community involvement process of any environmental statute including the authority to award technical assistance grants to communities to help them be active participants in the cleanup process.

EPA will continue to involve the community in every significant Superfund program milestone from listing on the National Priorities List (NPL) to choosing and constructing a remedy. I agree with you that when EPA lists a site on the NPL and starts cleaning up a Superfund site, the Agency has a commitment to finish the cleanup. EPA will keep communities informed of a Superfund site's status and progress, whether the cleanup milestone is performed earlier than anticipated or takes longer than anticipated. History has taught us that community support of a Superfund cleanup remedy is vital to the effectiveness of the remedy.

*Question 10.* How many participants were recruited for the CHEERS study? Please provide all information, including documents, on anyone recruited for the study.

Response. On April 8, 2005, I cancelled the Children's Health Environmental Exposure Research Study. Last fall, in light of questions about the study design, I directed that all work on the study stop immediately and requested an independent review. Since that time, many misrepresentations about the study have been made. EPA senior scientists have briefed me on the impact these misrepresentations have had on the ability to proceed with the study.

I have concluded that the study cannot go forward, regardless of the outcome of the independent review. EPA must conduct quality, credible research in an atmosphere absent of gross misrepresentation and controversy.

Please see the attached table for data on the number of participants that were recruited for CHEERS. As is the norm, all files (including personal information) are maintained by contractors and are confidential.

#### Attachment

##### Contractor CHEERS Telephone Screening Summary

October 15 through November 5, 2004

No. of Subjects	Status
114 .....	Total number of individuals who said they would be interested in the study
71 .....	Total number not yet contacted when stop work order was received.
43 .....	Total number contacted
31 .....	Completed Telephone Screening
17 .....	Eligible-Completed Telephone Screening
14 .....	Ineligible-Completed Telephone Screening
12 .....	Unknown Eligibility (started telephone screener-partial complete)

##### Home Screening Visit Summary

October 15 through November 5, 2004

No. of Subjects	Status
33 .....	Home Screening Completed
14 .....	*In Progress
	Contractor was in the process of contacting potential participants to set up home screening visit when stop work order was received.

*Question 11.* Please provide the names and offices of EPA personnel involved in the development and implementation of the CHEERS study and a detailed description of their role in the study program.

Response. Dr. Roy Fortmann, EPA/ORD, Principal Investigator and alternate-Task Order Project Officer; Dr. Nicolle Tolve, EPA/ORD, Principal Investigator and Task Order Project Officer; Dr. Suzanne McMaster, EPA/ORD, co-Principal Investigator; Dr. Lisa Melnyk, EPA/ORD, co-Principal Investigator.

The Task Order Project Officer directs the work of the contractor who would actually implement the study in the field by collecting the samples and survey information. The Alternate Task Order Project Officer does this work in the absence of the Task Order Project Officer.

The Principal Investigator (PI) is the lead person for design and implementation of the study, including integrating the contributions of the co-Principal Investigators (co-PIs). The PI will serve as the technical expert in his/her particular area of expertise and will synthesize the inputs of co-PIs so the overall effort is cohesive and answers the questions/objectives of the study. In this case, two people, Dr. Roy Fortmann and Dr. Nicolle Tolve, shared that responsibility as a team. Dr. Fortmann's particular area of expertise is human exposure assessment and exposure factors. Dr. Tolve's area of expertise is multi-media pathways and exposure.

The co-Principal Investigators have responsibility for the scientific merit of the study in their particular areas of expertise. They work with the Principal Investigators to ensure that the components of the study for which they are responsible are scientifically sound and address the questions/objectives of the study in their own areas. This study had four co-Principal Investigators. Dr. McMaster's expertise is in neurotoxicology and assessment in infants and children. Dr. Melnyk's expertise is in exposures through foods and handling of foods.

The following individuals had responsibility for the review and oversight of research. Because this took place over a 2.5 year period, different individuals were in different positions throughout the course of the study.

Dr. Linda Sheldon, EPA Office of Research and Development (ORD), National Exposure Research Laboratory, Human Exposure and Atmospheric Sciences Division (HEASD)—Associate Division Director for Science, Acting Division Director; Dr. Jerry Blancato—Acting Division Director (HEASD), Acting Associate Laboratory Director (NERL)—NERL's Human Subjects Research Review Official in that capacity; Dr. Larry Cupitt—Associate Laboratory Director (NERL)—NERL's Human Subjects Research Review Official in that capacity; Dr. Gary Foley—NERL Laboratory Director; Dr. Peter Preuss—EPA's Human Subjects Research Review Official.

*Question 12.* Please provide all information, including written information, provided to potential participants in the CHEERS study, including but not limited to information related to waivers of liability.

Response. Potential participants were given a CHEERS study flyer (attached) with contractor contact information and an EPA web site for further information. Only 3 subjects completed the home screening visit. No one actually was enrolled into the study. Therefore at most 3 potential study participants were given a Participant Consent form at the time of the home screening visit. EPA's pesticide program's educational material on the safe handling of pesticides around children was to be given to all study participants. All participants were to be educated on the safe handling of pesticides around children and given contact information on using Integrated Pest Management practices in lieu of pesticides. (Note: some of the materials are attached herewith; the remainder will be hand-delivered).

*Question 13.* Please identify all pesticides or chemicals that were to be considered in the CHEERS study. For each pesticide or chemical, please provide a description of any data EPA has collected or is aware of historically on the risks associated with that chemical and any limitations or instructions on the use of those chemicals around children.

Response. CHEERS was intended to be an observational study to measure chemicals in the home environment. Thus, the CHEERS pesticides and chemicals were a list of those that we proposed to measure in environmental samples. This was not a list of the pesticides/chemicals that participants would be required to apply or use. Sampling was intended to measure concentrations that resulted from normal use patterns. Participants were not expected to change their everyday patterns of use (unless we observed that something harmful was being done). All of the pesticides on the attached list are registered for indoor use, thus we might have expected to find them in environmental samples in the home. This is similar to approaches used by CDC and the National Health and Nutrition Examination Survey (NHANES). They analyze a large number of chemicals in blood and urine, but they are not ex-

pecting that all individuals in the population will be exposed to all of the pesticides on the attached list.

## Attachment

Pesticides	Phthalates	Brominated Flame Retardant Congeners	Perfluorinated Compounds
Allethrin (cis/trans) .....	Butyl benzyl phthalate .....	47	PFOS
Bifenthrin .....	Dibutyl phthalate .....	99	PFOA
Cyfluthrin .....	Diethyl phthalate .....	100	Me-FOSE-OH (2-(N-methylperfluorooctanesulfonamido)ethyl alcohol)
Cyhalothrin .....	Di(2-ethylhexyl) phthalate .....	153	Et-FOSE-OH (2-(N-ethylperfluorooctanesulfonamido)ethyl alcohol)
Cypermethrin .....	Diisononyl phthalate .....	154	
Deltamethrin .....	Diisodecyl phthalate .....	181	
Esfenvalerate .....	.....	183	
Fenpropathrin .....	.....	190	
Imiprothrin .....			
Permethrin (cis/trans) .....			
Prallethrin .....			
Pyrethrin .....			
Resmethrin .....			
Sumithrin .....			
Tetramethrin .....			
Tralomethrin .....			
Chlorpyrifos .....			
Diazinon .....			
Piperonyl butoxide .....			
Fipronil .....			
DEET .....			

EPA has rigorous regulatory programs for both pesticides and chemicals. All pesticides sold or distributed in the United States must be registered by EPA, based on scientific studies showing that they can be used without posing unreasonable risks to people or the environment. The discussion in the attachment is the available EPA information on risk of these pesticides and chemicals.

## ATTACHMENT

*Status of Pesticides in CHEERS.*—The 21 pesticides included in CHEERS have all been registered by EPA. Over half (11) also are subject to reregistration because they were initially registered prior to November 1984 and must be reevaluated to ensure that they meet current scientific and regulatory standards.

- 10 of the CHEERS pesticides are new pesticide active ingredients initially registered after November 1, 1984. These pesticides were evaluated against current scientific and regulatory standards and found to meet current requirements for registration. They should not pose unreasonable risks to human health and the environment, including risks to children, when used in accordance with their EPA-approved label directions and precautions. Those pesticides are:

- Bifenthrin
- Cyfluthrin
- Cyhalothrin
- Deltamethrin
- Esfenvalerate
- Fenpropathrin
- Imiprothrin
- Prallethrin
- Tralomethrin
- Fipronil

- FIFRA as amended in 1996 provides for review of all pesticides on a recommended 15 year cycle to make sure they continue to meet current scientific and regulatory standards for registration. These 10 pesticides and all other registered pesticides will be reevaluated in the future through the Registration Review pro-

gram. The Agency expects to publish the final Registration Review rule in 2006, with implementation starting in 2007.

#### *11 CHEERS Pesticides Subject to Reregistration*

• Eight pesticides subject to reregistration are currently under review and decisions for these pesticides are scheduled to be completed between now and the end of September 2008. These pesticides and their anticipated RED completion dates are as follows:

- Allethrin - 2007
- Cypermethrin - 2006
- Permethrin - 2006
- Pyrethrin - 2006
- Resmethrin - 2006
- Sumithrin - 2008
- Tetramethrin - 2008
- Piperonyl butoxide - 2006

• Three of the pesticides subject to reregistration have completed reregistration, they include: chlorpyrifos, diazinon, and DEET. See summaries below.

*Diazinon and Chlorpyrifos.* EPA completed its review of residential uses of chlorpyrifos and diazinon in 2000. Both compounds had extensive homeowner and residential uses which could potentially expose children. After reviewing the toxicology databases for both of these organophosphorus compounds, the Agency found that there was a potential for adverse exposures to children through uses in and around the home. Virtually all residential uses of chlorpyrifos were cancelled, with a retail stop sale date of December 2001. All residential uses of diazinon were cancelled, with a phase-out ending all retail sales of indoor products by December 2002 and retail sales of outdoor residential products by December 2004.

Although residential use of these two pesticides were cancelled in 2002 and homeowners do not report applications, we still detect measurable concentrations in samples taken from nearly all homes. These pesticides are also routinely measured in dietary samples. Thus, the Agency felt it was important to document their continued prevalence in environments where children spend time.

*DEET.* EPA completed the DEET reregistration in 1998. The Agency has carefully considered whether DEET's use has been implicated in seizures among children. The Agency believes that the incident data are insufficient to establish DEET as the cause of the reported effects. However, because of DEET's unusual use pattern (direct application to human skin and clothing) and its association with seizure incidents, the Agency believed it was prudent to require clear, common sense use directions and improved label warnings and restrictions on all DEET product labels. These label changes have been implemented.

#### *PolyBrominatedDiPhenylEthers (Brominated Flame Retardants):*

To supplement a voluntary phase-out of two common flame retardant chemicals scheduled for the end of this year, EPA is taking action to ensure that no new manufacture or import of two flame retardant chemicals occurs after January 1, 2005, without first being subject to Agency review. The two chemicals, Penta and Octa are part of a chemical group called polybrominated diphenyl ethers, or PBDEs, and have been used as flame retardants in commercial products such as furniture foam and structural plastics in small electronic appliances and computers.

This action follows a November 3, 2003 announcement by the Great Lakes Chemical Corporation, the only U.S. manufacturer Penta and Octa, who agreed to voluntarily phase-out production of these chemicals by December 31, 2004. This regulatory procedure by EPA, known as a Significant New Use Rule, will ensure that prior to any manufacture or import of these chemicals, EPA will have 90 days to evaluate potential risks, and can prohibit or limit any new use or activity that may pose a concern. EPA is concerned that manufacturing could be restarted in the future, and this action provides EPA the opportunity to evaluate and control future uses associated with both Penta and Octa.

Phasing out these two chemicals, while spurring the development of safer alternatives, without compromising the benefits derived from flame retardant use, are priorities for EPA and various stakeholders. To promote these goals and to explore the safety of alternative flame retardant chemicals, EPA has convened a group of stakeholders in its Furniture Flame Retardancy Partnership, that includes chemical manufacturers, the furniture industry, government agencies, and consumer groups

#### *PFOA/PFOS:*

PFOA is a persistent chemical causing systemic and developmental toxicity in animal studies and has a half-life in humans measured in years. In April 2003, EPA

released a preliminary risk assessment for PFOA, and started a public process to identify and generate additional information needed to strengthen the risk assessment. In February 2005, the Agency presented a draft preliminary risk assessment to the SAB for review to ensure that innovative approaches being used in the development of the risk assessment are scientifically sound. Comments from the SAB should be provided to the Agency this summer. The Agency has an aggressive effort underway to better understand the potential risks that this essential ingredient used in the manufacture of a wide range of non-stick surfaces may pose to the public. EPA is actively engaged in a formal process with industry and other stakeholders which is resulting in voluntary commitments to test PFOA and routes of human exposure. These efforts will assist the Agency in determining, if necessary, appropriate risk management actions.

*Question 14.* Please provide a description of previous studies done on the chemicals or pesticides involved in the CHEERS study, including any studies on increased incidence of cancer or other illnesses in children exposed to these pesticides or chemicals.

Response. Several observational studies that measured pesticides and other chemicals in homes have been conducted or planned. These include the National Human Exposure Assessment Survey (NHEXAS) program, the Jacksonville 2001 study, and several EPA STAR grants. CDC has measured metabolites of some of the chemicals in blood and urine as part of the National Health and Nutrition Examination Survey (NHANES). The National Children's Study, which is in the planning stage, is a large epidemiological study that is intended to evaluate health effects of chemicals in children. In addition, see above response to Question No. 4.

*Question 15.* Please provide all documents and information related to the agreement between EPA and the American Chemistry Council on funding for the CHEERS study. Please summarize and explain any limitations or conditions imposed by the American Chemistry Council on information related to the study, including data.

Response. The documents related to the Cooperative Research and Development Agreement (CRADA) between the American Chemistry Council (ACC) and EPA on the CHEERS study are attached, along with a brief summary of what is in each document. The ACC did not impose any limitations or conditions on information related to the study. The ACC's support came with no strings attached. The provision in the CRADA that allowed the ACC 45 days to review and provide suggestions on any publication of data is a standard provision of all EPA CRADAs. It does not allow ACC to prevent the EPA from publishing results nor does it give the ACC any right to require revisions to a publication. Likewise, the provision that EPA acknowledge ACC as a contributor in any publications related to the study involves a simple factual statement, and does not allow the ACC to influence the content of any such publications. As is the norm, EPA would acknowledge the ACC as a contributor regardless of the provision.

*Question 16.* Please indicate what human testing studies have been considered by EPA in the case by case review process for such data now in place at EPA, including detailed summaries of those studies. Please indicate whether payment of subjects or ingestion of pesticides or chemicals by subjects was involved in those cases. Please also indicate whether minors were involved in any of those studies.

Response. Over the years, scientific research with human subjects has provided much valuable information to help characterize and control risks to public health, but its use has also raised particular ethical concerns for the welfare of the human participants in such research, as well as scientific issues related to the role of such research in assessing risks.

To address these concerns, EPA and 17 federal agencies promulgated the "Common Rule" to ensure that research done by, or funded by, federal agencies meet the highest ethical standards. As a result, we have procedures in place whereby all EPA research that involves human subjects must have the protocol, consent forms, compensation, etc., approved by an Institutional Review Board, and that approval, as well as the basic documents, are reviewed and approved by the EPA Human Subjects Research Review Official (HSRRO).

Since 2000, the EPA HSRRO has approved 236 research studies involving human subjects. These studies have been captured on summary sheets which are attached, along with an abstract or description of the study.

#### *Third-Party Human Research*

A small amount of the scientific information has been submitted to EPA that is generated by researchers who are not part of or supported by a federal agency. The Agency refers to such research as "third-party" research.

From 2001 to May 2003, EPA policy and practice was not to use in its risk assessments or regulatory decisions data from third-party research involving intentional dosing of human subjects for the purpose of identifying or quantifying a toxic effect. On February 8, 2005, EPA published a Federal Register notice seeking public input on ways to strengthen protections for participants involved with human subjects research submitted to EPA. This notice discussed the initiatives the Agency will undertake to develop a comprehensive plan for the review and consideration of studies involving human subjects. A major part of this effort will be to evaluate and adopt, as appropriate, the recommendations from the NAS on human testing. EPA is seeking comment on its future plans, which include rule making processes, public engagement, and developing additional policy guidance as needed. In addition, the notice described EPA's current case-by-case approach for evaluating third-party human studies.

Consistent with the court decision in the Crop Life America case however, EPA has used the results of such studies in a few, limited cases. These are described more fully below.

*Perchlorate.*—Early this year, EPA released its risk assessment for perchlorate, a naturally occurring and man-made chemical that is increasingly being discovered in soil and water. Most of the perchlorate manufactured in the United States is used as the primary ingredient of solid rocket propellant. One of the key studies for the risk assessment was conducted by Greer, et al in 2002. In this study, 37 adult male and female volunteers received a radio-labeled, oral dose of perchlorate for 14 days. The researchers measured thyroid uptake to evaluate the effect of perchlorate on thyroid function. EPA based its decision to rely on the Greer et al. (2002) study on the recommendation of the National Academy of Sciences (NRC, 2005), and note that this study had been undertaken at an institution conforming with the Common Rule on the protection of human subjects. A summary of EPA's risk assessment for perchlorate, including additional information on the scientific and ethical attributes of the Greer study, may be found at: <http://www.epa.gov/iris/subst/1007.htm>

*Acute Exposure Guideline Levels (AEGLs).*—AEGLs, are non-regulatory values developed by EPA and the National Academy of Sciences to describe the risk to humans resulting from once-in-a-lifetime, or rare, exposure to airborne chemicals. They are particularly valuable for use by first responders in emergency situations. More information on the AEGLs program is available at: <http://www.epa.gov/oppt/aegl>. In addition, EPA will be glad to provide all copies of the scientific studies used by the Agency in developing interim AEGLs, which were discussed at its December 2004 meeting.

*Hexavalent chromium.*—In May 2004, EPA asked its independent expert peer review group, the Scientific Advisory Panel (SAP), for advice on assessing the potential of hexavalent chromium. This pesticide is pending regulatory approval to greatly expand its use as a wood preservative in residential settings. There are concerns that hexavalent chromium can cause acute contact dermatitis and can elicit allergic responses through contact with skin. EPA presented the results of several third-party human studies to the SAP for their consideration. Additional information on these studies is available in EPA's risk assessment, along with the SAP's report on that meeting, at: <http://www.epa.gov/scipoly/sap/2004/index.htm>

In addition to the risk assessments discussed above, and consistent with the direction from the CropLife American litigation, EPA is currently considering through its reregistration program a number of pesticides for which intentional, third party dosing human studies have been submitted to the Agency. Before any regulatory decisions are finalized or based on these third party human studies, the Agency intends to make its scientific and ethical evaluations of these studies available to the public as part of the public participation process for the reregistration of pesticides. Under the public participation process, EPA releases a preliminary risk assessment on an active ingredient and takes public comment. After considering public input, the Agency revises its risk assessment and again takes public comment. The Agency would be pleased to provide copies of these studies.

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RESPONSE OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTION FROM  
SENATOR CARPER

*Question.* The Environmental Protection Agency has received a number of information requests from members of this committee. Specifically, Senator Jeffords has outstanding requests dating back as far as December 14, 2001. At the committee hearing Wednesday, you were asked whether you intended to respond to Senator Carper's request to provide additional analyses of his and Senator Jeffords' clean air bills. From your testimony, it would seem you'd prefer to respond to a bipartisan



request from the committee rather than to a request from an individual senator. On March 4, 2004, Senator Inhofe and Senator Jeffords sent a letter to then-Administrator Leavitt (Letter Attached). That letter states that EPA should respond to requests from either Senator Inhofe or Senator Jeffords, and I would assert other Senators as well. Please delineate EPA's process for determining which Congressional requests it chooses to respond to, and whether you agree with the position of Senators Inhofe and Jeffords.

Response. Senator Carper, the Agency does its best to provide information and technical assistance to any Member of Congress who may request such assistance, consistent with the Agency's obligations under existing laws and policies. My responses to your questions at the confirmation hearing on April 6th were based on the request in your March 3, 2005, letter to me in which you requested EPA to "provide a common platform of analytical information for all of the multipollutant proposals and any compromise bill language that may come out of negotiations." You have described to me several times that you would like a format that would allow an "apples-to-apples" comparison of various proposals. To provide such a format, I believe it is necessary and appropriate to consult with the authors of the other major multipollutant proposals to agree on the parameters of EPA's analysis and a discussion of whether and how certain provisions should be analyzed. Without such an agreement, I do not believe any resulting analysis would meet your objective of allowing an "apples-to-apples" comparison of the various proposals. I am encouraged by our recent conversations and look forward to working with you to meet your request for information.

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR CLINTON

*Question 1.* During our meeting earlier this week, I handed you a letter which discussed three specific topics and asked questions. I would appreciate if you answer those questions as part of this record, and I have inserted the text of that letter at the end of these questions for your reference. However, I wanted to clarify my question about the acid rain report in light of our discussion on Tuesday. As you know, I am extremely frustrated with the fact that the Administration has not yet produced an acid rain report as required by section 103(j) of the Clean Air Act. During the meeting, you indicated that one reason for delay in finalizing the report is that the impact of recent agency decisions had not been factored into the report, and that doing so could result in lengthy, additional delays. However, the Clean Air Act simply requires the report to Congress to describe acid deposition trends and the reduction in deposition rates that must be achieved in order to prevent adverse ecological effects. While it would be useful to understand the relationship between recently enacted policies, it is not a requirement of the law, and not a reason for further delay in providing the report to Congress. Therefore, I reiterate the request in my April 5, letter, and urge you to supply the draft report immediately and the final report as soon as possible.

Response. *Acid Rain*—EPA is concerned with the impact of acid deposition on sensitive lakes, streams, and forests in New York State and throughout the northeast. Passage of the 1990 Clean Air Act Amendments was an important step in addressing these impacts. Implementation of the Acid Deposition Control Program has resulted in reductions in acid rain and encouraging signs of ecological recovery, particularly in Adirondack Mountain lakes. As you observe, however, our work is unfinished. Many in the scientific community, including scientists consulted by the Hubbard Brook Research Foundation, maintain that additional reductions in sulfur and nitrogen deposition are necessary for further ecological recovery.

In March, EPA finalized the Clean Air Interstate Rule requiring significant further reductions in emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>). These reductions will act to further improve the health of forests, lakes, and streams in New York State and the region. Other recent federal rules and state actions will also cause SO<sub>2</sub> and NO<sub>x</sub> emissions to decline. Since section 103(j) requires, in part, a review of deposition and ecological effects occurring as a result of such emissions, it is prudent to add information to the Report that would provide Congress with the most up-to-date information which is available concerning such emissions.

As you know, the NAPAP report that you are concerned about is required by section 103(j) of the Clean Air Act. This section established an Acid Precipitation Task Force consisting of EPA, DOE, DOI, NOAA, NASA and additional members appointed by the President. In 1993, President Clinton promulgated Executive Order 12811 which created the National Science and Technology Council. This council, through its Committee on Environment and Natural Resources (CENR), is the body

that currently coordinates federal acid rain research and monitoring and the organization that oversees the production of the NAPAP report. Although EPA participates in the Acid Precipitation Task Force, we do not chair the group. For draft copies of the report, please contact CENR.

The NAPAP report is still undergoing interagency review. You have my assurance that I will devote the necessary resources at EPA to this process. I will also work with the interagency process to provide any necessary information and analysis as well as to assist the issuance of a final report. I am confident that CENR will release the report in May or June.

*Mercury*—To understand our approach to reducing mercury from the power sector, it is critical to understand that Americans are exposed to methylmercury through the fish we eat. EPA continues to recognize that fish and shellfish are part of a well-balanced diet that can contribute to heart health and children's proper growth and development. The best way for women of childbearing age, pregnant and nursing mothers, and young children to realize the benefits of eating fish and shellfish and be confident that they have reduced their exposure to the harmful effects of mercury is to follow the EPA-FDA Fish Advisory issued last year. The CAMR reduction of emissions from U.S. power plants may affect local freshwater ecosystems, but will not significantly reduce concentrations in most marine fish. The importance of this point cannot be understated because the vast majority of fish and shellfish Americans consume come from ocean waters, and only a small portion of fish and shellfish consumed are freshwater recreationally caught fish. To imply that there is a quick fix to the mercury problem in the U.S. would be misleading.

The CAMR represents the first time that the federal government, or any nation, has regulated mercury emissions from the fleet of power plants. I am very proud of this fact. The CAMR rulemaking process was one of the most rigorous and thorough in EPA's history. This level of rigor was appropriate given the importance of the decision and the great deal of public interest in the issue.

As part of our analysis for CAMR, we looked at the possibility of "utility hotspots"—areas with methylmercury concentrations in fish due solely to power plants that exceed the methylmercury water quality criterion. Many lakes and rivers across the country, including in New York, unfortunately do have levels of mercury such that states issue fish advisories. It is important to understand that most of that mercury in fish across the country comes from sources other than U.S. power plants and therefore cannot possibly be addressed through this rulemaking. You refer to regions in your state as "hotspots" but they are likely not "utility hotspots."

The final CAMR that I signed dovetails with CAIR and, combined, provide for a flexible, multipollutant approach to reducing SO<sub>2</sub>, NO<sub>x</sub>, and mercury from the power sector. We determined that this multipollutant approach provides significant public health benefits by creating strong incentives for the installation of a large number of scrubbers and SCRs that will reduce SO<sub>2</sub> and NO<sub>x</sub>, respectively, and will also reduce mercury emissions, particularly the types of mercury that matter most for reducing U.S. deposition. By 2015, the benefits of CAIR and CAMR are \$85 billion to \$100 billion annually. As a point of comparison, complete elimination of mercury emissions from power plants would not generate benefits anywhere near this large, even if doing so were technically possible.

In the Clean Air Act (CAA), Congress directed EPA to treat utilities differently than other industrial sources. CAA section 112 says that EPA can regulate utilities under that section only if EPA finds that such regulation is "appropriate and necessary" after considering implementation of other requirements of the Act. In the final CAMR, EPA concluded that it is not "appropriate or necessary" to regulate utility HAP emissions under Clean Air Act section 112 since utility HAP emissions remaining after implementation of other measures of the Act (e.g., the acid rain and recently promulgated CAIR programs) such emissions do not cause hazards to public health. Because EPA found that it is not appropriate or necessary to regulate utilities under section 112, it did not issue MACT standards.

Under the CAIR/CAMR approach, the flexibility of allowance trading creates strong financial incentives for coal-fired power plants to look for new and low-cost ways to reduce emissions and improve the effectiveness of pollution control equipment starting in 2010, much sooner than you suggest. The mandatory declining caps coupled with significant automatic penalties ensure that emissions will be reduced down to 15 tons when fully implemented. We fully expect that other countries will be more likely to follow the U.S. lead and take action to reduce mercury emissions from power plants if control technologies are more cost effective. Given that international action is essential for addressing the global pool of mercury, this is a very important benefit of a cap-and-trade approach compared to a MACT approach.

I believe the CAMR rule is valid—legally, scientifically, and as a matter of policy. As we said in the preamble to the final rule, if future information demonstrates that

additional control is warranted, EPA is committed to reopening and reevaluating the CAMR standards.

*WTC*—As you know, the World Trade Center (WTC) Expert Technical Review Panel has met nine times in open meetings in New York City since March 2004 to interact with EPA and the public on plans to monitor for the presence of residual WTC dust in indoor environments and suggest additional analyses that could be undertaken by EPA and others to evaluate the current level and the geographic extent of WTC contamination.

EPA's draft proposed sampling plan reflects input from individual panel members and the public, including the WTC community and labor coalition. The current proposal is to determine the presence of and evaluate the levels of contaminants of potential concern in lower Manhattan buildings, and also to measure for particular contaminants that could be markers for WTC dust. A formal comment period on the draft sampling plan closed on January 18, 2005. EPA is currently revising the draft proposal considering all comments received and will produce a final draft plan for discussion at the next panel meeting which we plan to hold in May (subject to panel members availability). It is our intention to make the revised final draft sampling plan publicly available two weeks prior to the panel meeting.

We are committed to do some sampling in Brooklyn, but the exact boundary is still being discussed. We are evaluating existing WTC-related information and evidence to determine the specific area of Brooklyn we would sample.

*Question 2.* As you know, in 2002 the wood treatment industry responded to the tremendous public concern about children's exposure to wooden playgrounds, picnic tables, and backyard decks treated with arsenic and hexavalent chromium, by agreeing to voluntarily phase out the production of the wood preservative Chromated Copper Arsenate (CCA) for residential uses.

I understand you played an instrumental role in helping to facilitate this voluntary phase-out, which took effect at the end of 2003. I applaud you and the EPA for helping to affect this change, which your Agency called "one of the most dramatic pollution prevention advancements in history." In addition to virtually eliminating the use of arsenic in the United States, this phase-out helped to eliminate the use of 64 million pounds of hexavalent chromium a year, according to EPA's Green Chemistry Awards Program, which awarded the Presidential Green Chemistry award to an alternative product containing no arsenic and no hexavalent chromium.

This is why I am extremely concerned that the EPA has failed to take action to deny pending applications to register the wood treatment chemical Acid Copper Chromate (ACC). EPA approval of ACC would reintroduce as much as 100 million pounds a year of the human carcinogen, hexavalent chromium, back into the consumer marketplace. Exposure to Hexavalent chromium is also known to cause such human health problems as kidney and liver damage, birth defects, and skin ulcers. In addition, this chemical has caused drinking water contamination, worker illness, as well as soil and air degradation.

I and many others believe that approving new ACC registrations would be a step backwards for the EPA and the wood treatment industry in the U.S. It would lead to the introduction of this hexavalent chromium-based product to the U.S. market where it is currently not in use. It would unnecessarily introduce a known human carcinogen into a widely used consumer product. It would create unnecessary exposure to hexavalent chromium among producers and consumers of preservatives and treated wood. And it would undermine the great progress the EPA and the wood treatment industry are poised to make as the industry transitions to a new, safer generation of wood preservatives.

As you know, EPA has the authority under FIFRA (the nation's pesticide safety law) to deny the registration for ACC due to insufficient data on the safety of the chemical. Why it has taken EPA so long to deny the registration applications for ACC, which presents clear threats to public health and the environment?

Response. EPA's action on the pending ACC application is dependent on two critical pieces of data that have not yet been submitted by the registrant to EPA. As described more completely below, EPA is concerned about potential dermal exposures to hexavalent chromium from treatment of wood with the ACC treatment solution. Hexavalent chromium as surface residue on treated wood may cause sensitization in humans contacting the wood in residential settings. Moreover, these surface residues have the potential to persist as the conversion to the less toxic trivalent chromium species is temperature-dependent.

To address the outstanding concerns, the Agency has taken several steps. The Agency presented its scientific issues regarding dermal sensitization to its Scientific Advisory Panel (SAP) in May 2004. Among other recommendations in its July 2004

report, the SAP noted that exposure information was important to determine potential risks associated with contact to treated wood surfaces. Specifically, the SAP stated: "It is not important how much of a chemical is in the matrix but how much is leached out of it and available for exposure."

In response to the report, the Office of Pesticide Programs has analyzed the recommendations, presented its analysis to the Agency's Science Policy Council (SPC), and based on recommendations from both the SAP and SPC, revised its level of concern for hexavalent chromium in ACC-treated wood. We are now waiting for two critical studies that the Agency required of the registrant in a letter sent January 2004. One of these studies will provide information that specifically addresses the level of hexavalent chromium on the surface of ACC-treated wood, and the other study is to determine levels of exposure to workers at wood treatment facilities. Once these data are submitted, the Agency will be in a position to make a determination as to whether there is a risk of dermal sensitization from exposure to hexavalent chromium resulting from contact to treated wood.

In addition, an extensive study of the cancer risks posed by oral ingestion of hexavalent chromium is underway by the National Toxicology Program (NTP) and we expect those results in May 2005. Upon receiving this study and the two studies requested of the registrant noted above, the Agency will be able to determine whether the law's "reasonable certainty of no harm" safety standard, including infants and children's exposures, can be met, and thus, make its registration decision.

*Question 3.* Mr. Johnson, you served as head of the Director of the Office of Pesticide Programs, which is charged by federal laws with ensuring that pesticides are used in a manner that does not pose a risk to human health. In particular, the laws require EPA to account for the special susceptibility of infants and children to the toxic effects of the many pesticides they are exposed to. Unfortunately, there have been claims that EPA's decisions in the area of pesticide regulation too often erred on the side of the interests of the pesticide manufacturing and application industries, instead of the health and safety of our nation's children. For example, in 2001, EPA reversed a decision to require manufacturers of rat poison to include bittering agents that would help prevent childhood poisonings, based only on the recommendations of pesticide applicators. Similarly, EPA faced charges that it had failed to apply a special statutory tenfold safety factor to protect infants and children from pesticides in their food. In making these decisions, EPA relies almost exclusively on data provided by the pesticide manufacturers whose only motive is to sell more of their products. Can you give any assurance that as Administrator you will give more weight to the laws' presumptions in favor of protecting human health, particularly children's health?

Response. I am committed to ensuring that the laws administered by EPA are implemented and enforced in a manner that protects human health, particularly children. EPA's decisions during my years with the Office of Pesticide Programs have brought significant new safeguards for pesticide use and we are already seeing the results. Pesticide poisonings of children by chlorpyrifos have fallen dramatically, and residues in children's food from a number of pesticides have declined.

Regarding the regulation of rodenticides, in 1999, EPA formed the Rodenticide Stakeholders Workgroup as a subcommittee under the federally-chartered advisory body, the Pesticide Program Dialogue Committee (PPDC), to consider, among other things, the risks to children of accidental exposure to rodenticides and potential measures to reduce such exposures. This workgroup included representatives from the EPA, CDC, USDA, State officials, the medical community, public interest groups, the pesticide industry, and members of the general public. The workgroup fully considered the possibility of requiring bittering agents in rodenticide products as it reviewed information presented by a broad range of interested and affected parties. The workgroup ultimately recommended against the requirement of bittering agents due to the potential for adverse effects on the efficacy of rodenticide products. This recommendation reflected their recognition of the significant public health risks posed by rodents, and the widely held concerns that requiring all products to contain bittering agents could hinder efforts to control rodent populations in certain circumstances. EPA adopted the workgroup's recommendations, and in November 2001 issued a Federal Register notice announcing its decision to rescind the bittering agent requirement. While EPA does not currently require bittering agents in all rodenticide products, the Agency encourages rodenticide manufacturers to incorporate them voluntarily in certain products. In fact, many of the rodenticide products on the market today do contain bittering agents. Finally, we are still in the process of completing our reevaluation of the rodenticides, and we will continue to monitor all available information on childhood poisonings. As we bring our review

to closure, we will make sure that appropriate risk mitigation measures are put into place to ensure the safety of children.

Regarding protecting children under the Food Quality Protection Act, when establishing or reviewing tolerances under the Federal Food Drug, and Cosmetic Act, the EPA is required to apply an additional tenfold safety factor to protect infants and children, unless the Agency can find on the basis of reliable data that another safety factor will adequately protect infants and children. In order to ensure that the Agency implemented this critical provision, EPA used a very public process to develop guidance explaining how such decisions should be made. In addition to seeking public comment, the Agency sought advice from its independent expert scientific peer review body, the FIFRA Scientific Advisory Panel, on several occasions. Generally, the guidance calls for EPA to review the extensive database available on each pesticide and to retain the additional tenfold safety factor unless we have a sound scientific database to support a change.

Following this guidance, EPA has made several hundred chemical-specific determinations under this provision. Each of these decisions is fully documented in reviews that are available to the public as part of the Agency's public participation process. For just over half of the pesticides, EPA concluded that the additional tenfold factor is not necessary and therefore may be removed. For the balance of the pesticides, EPA has retained some additional safety factor, in some case the statutory tenfold factor, and in other cases factors ranging from 3 to 30. We believe that examination of the individual chemical decisions about safety factors will demonstrate that EPA's conclusions are based on scientific assessments.

*Question 4.* Documents submitted into the record by pollution control equipment manufacturers stated that 70–90 percent mercury control from coal-burning power plants can be guaranteed by vendors and bought by power plants today, yet EPA has made the case that control technologies for mercury aren't yet “commercially available”. Why did EPA not rely on the most recent information about commercial availability and capability of mercury pollution controls for coal-burning power plants?

Response. EPA is optimistic that some, if not all, of the mercury control technologies currently being tested will be ready for commercial-scale deployment across the fleet of coal-fired power plants after 2010. The high degree of variability in the test results to date, combined with the inability to adequately assess balance of plant issues (i.e., what happens over long periods of time when using these advanced mercury removal technologies) led the Agency to determine that mercury-specific control technologies were not available for fleet-wide deployment in the 2008-2010 timeframe. As outlined in the final CAMR, EPA believes these technologies will become available after 2010, and that they will play a significant role in reducing mercury emissions well below the anticipated co-benefits levels dictated by the CAIR alone.

Results from the DOE's mercury Phase I Testing Program are outlined in EPA's Office of Research and Development (ORD) updated White Paper (March 2005) on mercury control technologies which can be found in the CAMR docket. In these projects, mercury-specific technologies were tested at different coal-fired power plants, representing both different coal types and varying air pollution control device configurations. The results from these studies, along with other information, were used to form the basis of the ORD assessment of technology. Given the promising results from the Phase I experiments, the DOE embarked on a longer-term Phase II program, which is currently underway, to better understand the impact of these mercury-specific control systems on different coal types (e.g., subbituminous and lignite coals) over longer periods of time. The final results from these studies will not be available before 2008–2009.

The multipollutant approach of CAIR and CAMR provides public health benefits by focusing first on reducing SO<sub>2</sub> and NO<sub>x</sub> while providing strong incentives for the further development and installation of mercury-specific technologies starting in 2010, well in advance of 2018. We expect that this approach will lead to the development of less costly technologies for reducing mercury emission from this sector.

*Question 5.* Does EPA plan to address the fact that, under the “cap and trade” approach, the maximum control level of 70 percent reduction—nominally due by 2018—will not be achieved until 2025 at the earliest? How can EPA say that cap and trade is the best approach to reduce mercury emissions from coal-fired power plants without ever analyzing the benefits of a MACT approach, required by the Clean Air Act? Why is a MACT approach, as required by the Clean Air Act, appropriate for all other industrial sources of mercury emissions, but not coal-fired power plants?

Response. Although the second phase will be initially higher than the caps that are required under CAMR, it is important to note that under a cap-and-trade program emissions are capped permanently and the first phase achieves early reductions of mercury because of the banking of excess emission reductions. Under a cap-and-trade approach, emissions reductions are achieved cost-effectively by offering sources more compliance flexibility, including the ability to buy allowances and these reductions tend to occur at the largest emitters because those emitters can achieve the most cost-effective reductions. In addition, compared to a MACT approach, the ability to bank and sell allowances under a cap-and-trade approach creates a more continuous incentive for the development of new mercury control technology.

In the Clean Air Act (CAA), Congress directed EPA to treat utilities differently than other industrial sources. CAA section 112 says that EPA can regulate utilities under that section only if EPA finds that such regulation is “appropriate and necessary” after considering implementation of other requirements of the Act. In the final CAMR, EPA concluded that it is not “appropriate or necessary” to regulate utility HAP emissions under Clean Air Act section 112 since utility HAP emissions remaining after implementation of other measures of the Act (e.g., the acid rain and recently promulgated CAIR programs) do not cause hazards to public health.

*Question 6.* As you know, EPA has responsibility to protect the most sensitive populations. Historically, EPA has taken into account impacts on sensitive populations in issuing its regulations. Why, in releasing the mercury rule, did EPA focus on the average American and not those populations most vulnerable to mercury poisoning, such as women of childbearing age, young children, Native Americans, and subsistence fishermen?

Response. The focus of our rule was on sensitive populations—women of childbearing age and the developing fetus. It should be noted that EPA’s reference dose for methylmercury is based on protecting the most sensitive population: women of childbearing age. We looked at highly exposed groups including certain Native American tribes and subsistence fishermen families. This is explained in detail in the Regulatory Impact Analysis and in other documents supporting the final CAMR and the revision of the 2000 regulatory finding.

*Question 7.* As of December 1, 2004, EPA had closed 128 of the Title VI complaints it had received. Most were rejected for jurisdictional deficiencies. Of the 30 complaints accepted for investigation, none resulted in a finding of violation. Although some of the complaints investigated were filed by individuals with limited legal experience, others were filed by Congressional representatives or by public interest organizations specializing in environmental justice issues and who could be expected to recognize violations of Title VI and its regulations. Other agencies, such as the Department of Education, have routinely found in the complainant’s favor and negotiated changes in recipient behavior or policies. How do you explain the EPA’s record of finding no violations of Title VI or its implementing regulations in more than 10 years of investigating such complaints? Given that other agencies have found Title VI violations in their investigations, could EPA’s investigation or review standards be responsible, in part, for the fact that even those cases of disparate impact that are most obvious to the casual observer are incredibly difficult, if not impossible, to substantiate?

Response. The goal of EPA’s Office of Civil Rights External Compliance Program is to ensure that recipients of EPA assistance comply with the relevant non-discrimination requirements under federal law. EPA has worked diligently to bring apparent noncompliant recipient agencies into compliance. EPA’s regulations require EPA to attempt informal resolution whenever possible. The term “informal resolution” refers to any settlement of complaint allegations prior to the issuance of a formal finding of noncompliance. While EPA has never made a finding of non-compliance, EPA has informally resolved allegations from 7 Title VI complaints with recipient agencies to improve their policies and procedures. Two other complaints were informally resolved by the complainant and recipient, without EPA involvement. EPA is currently in the process of formalizing another settlement agreement that will address concerns raised in 3 separate Title VI complaints. EPA’s focus on bringing recipient agencies into compliance benefits the public by ensuring service is provided in a nondiscriminatory manner.

*Question 8.* In the majority of cases actually investigated by EPA and dismissed on the merits, EPA found that the challenged decisions or projects would not cause an adverse impact. In many of these cases, that decision was predicated on compliance with National Ambient Air Quality Standards (NAAQS) or other environmental laws. However, EPA has stated in its Revised Draft Guidance on Inves-

tigating Title VI Complaints that compliance with environmental standards alone does not guarantee compliance with Title VI and, in fact, studies have found adverse health impacts from exposure to some pollutants (i.e., particulate matter) at levels below the NAAQS. (See, e.g., Jonathan Samet et al., *Fine Particulate Air Pollution and Mortality in 20 U.S. Cities, 1987–1994*, 343 *New Eng. J. Med.* 1742 (2000).) In light of these facts, how does EPA make a determination that compliance with NAAQS or other environmental standards will, in fact, prevent any adverse impacts?

Response. OCR relies, to some extent, on existing environmental standards when assessing Title VI complaints. As you noted, the NAAQS is one example of such a standard. OCR has stated that air quality in areas attaining the NAAQS “is presumptively protective of public health in the general population.” Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,680 (2000) (emphasis added). In other words, while the NAAQS provides an important benchmark in determining whether adversity exists, attainment of the NAAQS merely establishes a rebuttable presumption of no adversity. OCR does not believe it would be appropriate to wholly rely on the NAAQS both because of the inherent limitations of the NAAQS, such as those you mention, and because an environmental standard may not adequately analyze adversity in the civil rights context. Examples of the latter circumstance include whether the environmental standard encompasses the same sources relevant to a civil rights analysis and whether the environmental standard focuses on potentially unique characteristics of the affected population in a civil rights complaint.

*Question 9.* In the case of the Midland Avenue complaint, EPA resolved the matter in a relatively short period—less than one year. Many other complaints remain unresolved after five years or more. In fact, the first complaint ever to be filed with the EPA—the St. Francis Prayer Center complaint regarding the Genesee Power Station (submitted to EPA in 1992; recognized by EPA in July 1994 and accepted for investigation in January 1995) remains unresolved, according to EPA’s own website. How does the EPA plan to address this backlog of complaints and ensure that new complaints are handled in a timely fashion?

Response. In 2004, EPA increased staff by 75 percent to provide sufficient support to its External Compliance Program. While EPA is working diligently to complete work on all old cases, the Midland Avenue complaint is an example of OCR’s efforts to handle new complaints as expeditiously as possible.

EPA has also focused on educating recipient agencies to help reduce situations that could result in the filing of Title VI complaints. These efforts include (1) EPA-sponsored training on public participation for recipients, community groups, and industry, (2) guidance for recipients on public involvement, 70 Fed. Reg. 10,625 (2005), and (3) guidance for recipients on limited English proficiency, 69 Fed. Reg. 35,602 (2004).

*Question 10.* Since the EPA has never finalized its Revised Draft Guidance for Investigating Title VI Complaints Regarding Permitting, what are the standards that the agency is using to investigate these complaints?

Response. Evaluations of alleged violations of EPA’s Title VI regulations are based on the facts and totality of the circumstances that each case presents. Rather than using a single standard for analyzing and evaluating adverse disparate impact allegations in all situations, EPA uses several techniques to determine compliance. EPA has used techniques practiced by the EPA Title VI Task Force, which closed over 52 complaints, techniques described in the U.S. Department of Justice’s Title VI Investigation Procedures Manual, techniques described in the EPA Revised Draft Investigation Guidance, which is being evaluated internally based on application during some investigations, as well as EPA’s Title VI regulations and case law.

*Question 11a.* EPA dismissed the Midland Avenue complaint, because it found that the challenged project would not have a “significant adverse impact” on the host community. This assessment was based solely on a review of the project under the National Environmental Policy Act (NEPA). This NEPA review relied in part on proposed, but unrealized, mitigation measures and, in part, on a technical justification for the placement of the facility to reach its Finding of No Significant Impact (FONSI). In addition, under the Revised Draft Guidance for Investigating Title VI Complaints Regarding Permitting, EPA notes that the “significance” of an adverse impact will be determined based both on the severity of the impact and the disparity in demographic characteristics. (a) How does EPA justify relying entirely on the NEPA analysis in light of its deficiencies?

Response. The approach developed to investigate a complaint depends on the nature and complexity of issues involved in the case. In the Midland Avenue Regional Treatment Facility (RTF) complaint, EPA's Office of Civil Rights (OCR) examined whether the recipients violated EPA's Title VI regulations by approving an Engineering Design Report and the Midland Avenue RTF and Conveyances Facility Plan. Here, OCR principally relied on a review of the unusually extensive and complete record of the development and approval of the Syracuse combined sewer overflow abatement program (and of the Midland Avenue Regional Treatment Facility). This investigation was conducted by reviewing documents provided by the complainants, recipients, and EPA Region 2. OCR primarily reviewed the U.S. EPA Region 2's Environmental Assessment (EA), EPA Region 2's Response to Comments issued with the EA, EPA Region 2's 2004 EA Re-evaluation, and the Environmental Information Document. OCR also examined the Amended Consent Judgment, the Alternative Site Evaluation Overview Document, the Midland Avenue RTF and Conveyances Facility Plan, and the Wastewater Technology Fact Sheet: Chlorine Disinfection (EPA 1999).

In response to the statement that EPA's assessment was based on "proposed, but unrealized, mitigation measures," the impacts alleged in the complaint were "anticipated" consequences as a result of the construction of the Midland Avenue RTF. There were no actual, realized impacts since the construction of the facility had not yet begun. Therefore, the analysis is largely based on anticipated consequences and mitigative measures (some already implemented), where necessary. The technical justification for the project is to abate a public health nuisance by reducing and eliminating raw sewage discharges to Onondaga Creek from combined sewer overflows (CSOs) and eliminate odors. In response to concerns raised by the community, the building size was reduced from 30,000 to 24,000 square feet, the distance from the nearest residence to the facility was increased from 90 to 250 feet, the number of vortex units was reduced from 3 to 2, and the frequency of operation was reduced from 50 times per year to 9 times per year. After a review of all of the documents, OCR concluded that the location and design of the Midland Avenue RTF would not have a significantly adverse impact or discriminatory effect on the surrounding neighborhood.

*Question 11b.* How does EPA justify determining "significance" based wholly on NEPA standards without considering the disparity of demographic characteristics?

Response. Under EPA's Draft Revised Investigation Guidance, the "adverse impact" decision is a determination as to whether an estimated risk or measure of impact is significantly adverse, independent of demographics. If the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of noncompliance with EPA's Title VI regulations and disparity is not considered. Draft Revised Investigation Guidance, 65 Fed. Reg. 39,680 (2000). An assessment of disparity is not necessary where adversity does not exist. In the assessment of the Midland Avenue RTF, OCR did not find adversity, so disparity was not analyzed. Id. 39,682.

*Question 12.* On January 15, 2003 the Bush administration issued an advance notice of proposed rulemaking (ANPRM) crafted to dramatically weaken the Clean Water Act by narrowing the definition of what qualifies as a "water of the United States" to remove longstanding federal protections for many wetlands, streams, lakes and other waters. In response to opposition to this proposal from a broad array of interests, including scientists, state agencies, Attorneys General, environmental groups, and hunting and fishing interests, the administration announced on December 16, 2003 that it would not pursue this ill-conceived rulemaking.

However, a policy directive that was issued at the same time (and that essentially accomplishes the purposes) as the now-abandoned rulemaking proposal was left in effect. Among other things, this directive requires Corps districts and EPA field staff to seek "formal project-specific approval" from headquarters before asserting Clean Water Act jurisdiction over waters—but for staff to say that a water is not jurisdictional requires no such approval.

This policy directive (Appendix A to the January 15th Federal Register notice) has caused untold harm to waters across the nation that are being stripped of federal protection, from an 86 acre lake in Wisconsin, to entire basins in the arid West, not to mention countless streams and wetlands across the country. In a particularly troubling case, the Corps determined that the Folsom South Canal in California, which among other uses sometimes conveys drinking water to the city of Rancho Cordova, is no longer covered by the Clean Water Act.

As mentioned above, the policy directive currently in place requires Corps districts and EPA field staff to seek formal project-specific approval from headquarters before asserting jurisdiction over waters of the United States. No such



prior approval from headquarters is required to assert that a water is non-jurisdictional.

Do you think it is a good policy for our nation's precious and limited water resources that no permission—or even notice—from the agencies' headquarters is needed to abandon Clean Water Act protections, but field staff must get permission before simply asserting the legal status quo (i.e., that these waters remain protected)?

Response. The January 2003 legal guidance states that field staff may no longer assert jurisdiction over isolated, intrastate, non-navigable waters based solely on the migratory bird rule, and that agency headquarters approval should be obtained prior to asserting jurisdiction over such waters based solely on other types of commerce links. The legal memorandum emphasizes that field staff should continue asserting jurisdiction over navigable waters, their tributary systems, and adjacent wetlands. The memorandum also emphasizes that jurisdictional calls must reflect existing regulations and relevant case law.

EPA and the Corps are taking a number of steps in response to the Supreme Court's decision in Solid Waste Agency of Northern Cook County (SWANCC). As we implement these actions and monitor their effectiveness, we are continuing to assess the adequacy of existing field practices, guidance, and training programs and will take appropriate steps to ensure Clean Water Act jurisdiction is correctly determined. EPA and the Corps are working together, based on the two years of experience will make decisions based upon that experience, current information and emerging case law.

EPA and the Corps are committed to increasing consistency, transparency, predictability, and sound science for the CWA section 404 program. The agencies have undertaken a number of steps in response to the Supreme Court's decision in Solid Waste Agency of Northern Cook County (SWANCC).

*Question 13a.* We are very concerned by what appears to be the lack of EPA involvement in the implementation of this policy directive. Please provide responses to the following questions: (a) Is/was EPA aware of Folsom South Canal determination? If so, what role did the Agency play in this water's non-jurisdictional determination? Does EPA agree that this water is no longer protected by the Clean Water Act?

Response. EPA and the Corps jointly implement the Clean Water Act (CWA) section 404 program. In this implementation partnership, the Corps is responsible for day-to-day permitting decisions in their respective Districts. Frequently, Corps and EPA field staffs coordinate jurisdictional or permitting calls. In this case, EPA did not participate in a decision regarding CWA jurisdiction over the Folsom South Canal.

*Question 13b.* If confirmed, would you support denying federal Clean Water Act protections to our nation's drinking water sources?

Response. EPA will continue to implement and enforce programs affecting all waters of the United States, including waters used as sources of drinking water, to the maximum extent of the law.

*Question 13c.* In another case, in June 2003, the Corps' Albuquerque District ruled that the entire 150-mile long Sacramento River in New Mexico and all of its tributaries are non-jurisdictional under the Clean Water Act because they are part of a "closed basin" system. Indeed, the Corps District issued a sweeping declaration that all "closed basin" systems were now unprotected by the Clean Water Act. What role did the Agency play in this non-jurisdictional determination? Does EPA agree that closed basin rivers and their tributaries should no longer be protected by the Clean Water Act?

Response. Jurisdictional calls are not made by categories of waters. Instead, they are made on a site-specific basis, guided by applicable regulations and case law, reflecting the often complex factual circumstances of the waters being considered. To our knowledge, the Corps has not issued a declaration that all closed basin systems are non-jurisdictional under the Clean Water Act (CWA) as a category. While we are unaware of the Sacramento River ruling, indeed, we are aware of site-specific affirmative findings of CWA jurisdiction over streams located in closed basins. For example, the Corps Albuquerque District issued a notice on March 16, 2005, that the Mimbres River, its tributaries and adjacent wetlands were jurisdictional based on the river's use by small watercraft.

*Question 13d.* Are there any Corps' non-jurisdiction determinations made since January 2003 with which EPA has disagreed? Please provide summary information about all such instances.

Response. The Corps and EPA have undertaken a variety of actions to increase coordination and minimize disagreement prior to reaching final determinations on

section 404 program implementation and jurisdictional determinations after SWANCC. EPA and Corps headquarters continue to coordinate on requests from the field on jurisdictional calls involving isolated intrastate non-navigable waters based solely on commerce links other than those in the migratory bird rule. Furthermore, a number of EPA Regions and Corps districts currently coordinate in advance on jurisdictional calls that raise challenging issues, reporting that such communications are effective in resolving differences in interpretation. And, EPA, Corps, and DOJ staffs also continue to have bi-weekly meetings to discuss jurisdictional issues and questions that arise in the field.

*Question 13e.* How many miles of streams, acres of wetlands and ponds, and miles of streams has the Corps and/or EPA declared to be non-jurisdictional under the policy directive (i.e. since January 2003)? Are these levels of losses of water resources acceptable to EPA?

Response. The Corps and EPA have been working together to assess the resource implications of SWANCC, and the agencies are committed to increasing the consistency, transparency, and sound science for the Clean Water Act (CWA) section 404 program. As part of this broader effort, the Corps Districts have posted information on their websites regarding findings of no-jurisdiction. Analysis of that information is on-going. One challenge we face when assessing the impact of the SWANCC decision is that we do not have comparative data from before the decision to act as a baseline for measuring change.

*Question 14.* In December 2003, the administration committed to not pursuing a rulemaking to narrow Clean Water Act jurisdiction. The clear implication of this announcement is that the existing Clean Water Act regulatory definition of "waters of the U.S." remains in effect and will be enforced.

If confirmed as Administrator, when do you plan to revoke the policy directive that has—for all intents and purposes—served as a vehicle enact the ends of the supposedly—abandoned rulemaking and that is in conflict with the existing regulations?

Response. If confirmed as Administrator, I would remain committed to full and effective implementation of the Clean Water Act and all its programs. As EPA and the Corps apply the regulatory definition of waters of the United States, we will continue to assess the adequacy of existing field practices, guidance, and training programs and will take appropriate steps to ensure Clean Water Act jurisdiction is correctly determined. With respect to revising the January 2003 guidance, EPA and the Corps are working together to assess the effectiveness of that guidance and will make decisions regarding the need for its revision based upon two years experience with the guidance, current information and emerging case law.

*Question 15.* On March 1, 2004, EPA's Inspector General released a report, "EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice," that found that EPA's Office of Environmental Justice (OEJ) and the agency overall have failed to adequately implement President Clinton's 1994 Executive Order 12898 "Federal Action to Address Environmental Justice in Minority Populations and Low-income Populations." The E.O. requires environmental justice principles to be integrated with EPA day-to-day operations to ensure minority and low-income populations are not subjected to disproportionately high levels of environmental risks.

Overall, the Inspector General concluded that EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations. EPA has not identified minority and low-income, nor identified populations addressed in the Executive Order, and has neither defined nor developed criteria for determining disproportionately impacted. Moreover, in 2001, the Agency restated its commitment to environmental justice in a manner that does not emphasize minority and low-income populations, the intent of the Executive Order.

What are your views on the Inspector General's conclusions? In particular, do you agree that, in order to implement E.O.12898, EPA must as a threshold matter identify predominately minority and low-income populations in order to determine whether such communities are experiencing or are at risk of experiencing disproportionately high levels of environmental risks? If EPA has not identified populations addressed in the Executive Order, how can the goals of the Executive Order be achieved?

Being as specific as possible, what steps would you take to address environmental justice concerns identified by the Inspector General's report? What performance measures would you adopt to measure EPA's progress in this area?

Response. On June 7, 2004, the Agency submitted its response to the Inspector General's report (a copy of is attached). I believe the Agency's June 7, 2004 response responds to your first three questions.

The Agency is developing an Agency-wide strategic plan for environmental justice (to be finalized in the fall of 2005), which will take into account the Inspector General's report.

The Agency is in the process of establishing specific performance measures, which began with the Environmental Justice Action Plans and Progress Reports for fiscal year 2003 and fiscal year 2004–2005 submitted to the Office of Environmental Justice by each Regional and Program Office (these documents can be found at: <http://www.epa.gov/compliance/resources/reports/ej.html>).

*Question 16.* Under the Toxic Substance Control Act, Congress directed EPA to issue regulations ensuring lead-safe remodeling and renovation practices in homes built before 1978. To date, EPA has not complied with this requirement, and has instead put forward a voluntary compliance program. My state of New York contains the largest number—3.3 million—and percentage—43 percent—of homes built before 1950. The risks to New York's minority children are pronounced. For example, in New York City, 95 percent of children found to be lead-poisoned in 2001 were African-America, Hispanic or Asian. Given the scope of the risk posed to children in New York and throughout the country, will you commit to issuing regulations as required under TSCA?

*Response.* EPA intends to work with the renovation and remodeling industry to increase the use of lead-safe work practices, which in turn will help us all to meet the goal of eliminating childhood lead poisoning. As part of this effort, the Agency is developing an education and outreach campaign that will convey the benefits of the use of lead-safe work practices to minimize both workers' and homeowners' exposure to lead dust during renovation and remodeling. EPA is also targeting outreach efforts to expand consumer awareness. Critical to creating demand for the use of lead safe work practices during renovation and remodeling is an educated consumer.

EPA plans to launch this material by this fall and will evaluate the effectiveness of this effort and will determine what additional steps may be necessary, including regulation.

*April 5, 2005.*

Mr. Stephen L. Johnson, *Acting Administrator*,  
U.S. Environmental Protection Agency,  
Washington, DC.

Dear MR. JOHNSON: As the Senate Environment and Public Works committee prepares to consider your nomination to be the Administrator of the United States Environmental Protection Agency (EPA), I would like you to consider several issues of great importance to my state of New York.

Acid rain remains a major problem in New York State, particularly in the Adirondacks. According to a recent report by the Hubbard Brook Research Foundation, forty-one percent of the lakes and streams in the Adirondacks suffer from acidification. In addition, one quarter of the Adirondacks' lakes and ponds are so acidic that they no longer sustain their native plant and animal life. Acid rain has also harmed the trees of the Adirondacks, where on some mountains, up to 80 percent of red spruce and balsam fir forests have been destroyed. To ensure that Congress has the information it needs to determine whether acid rain is being adequately addressed, the Clean Air Act requires the Administration to submit a report to Congress every two years showing acid deposition trends. Every four years, this report is also required to recommend pollution reductions levels necessary to prevent adverse ecological effects. Yet, in spite of evidence of continuing problems in the Adirondacks and elsewhere in the eastern United States, the Bush Administration has not submitted a single such report to Congress. I understand that EPA has completed a draft report. Please provide me with a copy of the draft report, and let me know when the report will be finalized.

As you know, I worked with the White House to secure an agreement to establish the World Trade Center (WTC) Expert Technical Review Panel in the fall of 2003. The primary charge of the panel, which is chaired by EPA, is to address lingering concerns about indoor contamination resulting from the collapse of the World Trade Center on September 11, 2001. As a result of the panel's work, EPA will soon finalize a plan to test New York City apartments and offices for WTC contaminants and to clean these contaminants up where they are present at dangerous levels. While significant progress has been made during the plan's development, I remain concerned about several aspects of the EPA's most recent draft plan. As EPA works to finalize modifications to the draft plan, I urge you to give strong consideration

to: adding additional samples to the testing program to examine contamination in Brooklyn; expanding the number of contaminants that will be tested; collecting and analyzing an adequate number of WTC dust samples to determine whether a valid WTC dust "signature" can be developed; setting clean-up triggers at levels that are protective of human health; testing in areas that are likely to harbor residual WTC contamination; and adding strong quality assurance procedures and other operational protocols that the draft plan does not include. In addition, I note that the planned April 11 meeting of the panel has recently been postponed, and I urge you to reschedule the meeting to occur not later than May, and to make the revised plan publicly available at least two weeks before the meeting.

Finally, I was dismayed by your recent decision to finalize a wholly inadequate EPA regulation to reduce mercury emissions from power plants. Mercury is a potent neurotoxin that we know is present at unhealthy levels in one in twelve American women, threatening their babies with developmental disorders. New research appearing next month in the scientific journal *Ecotoxicology* documents for the first time the wide-ranging negative impact of mercury deposition on ecosystem health. We now know that certain regions of the Northeast, including New York's Adirondack Mountains, have been identified as hotspots or areas of high mercury contamination in fish, birds and other animals. In spite of these facts, the rule that you finalized requires only modest mercury cuts, does not require installation of mercury-specific emissions controls at power plants for more than a decade, and allows trading of mercury. I believe that this approach is both unlawful and inadequate, and I will support Congressional efforts to overturn this regulation. I urge you to act immediately to revise the rule to better protect New Yorkers' health and environment from the dangers of mercury.

I appreciate your attention to these matters, which are of great importance to the people and natural environment of New York.

Sincerely yours,

HILLARY RODHAM CLINTON.

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RESPONSE OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR LAUTENBERG

*Question 1.* Both the Government Accountability Office and EPA's Inspector General recently issued reports showing that the Administration manipulated the science behind the new Mercury Rule. You've been at EPA for 25 years and know the agency has a long tradition of providing independent scientific analysis on environmental issues. A few weeks ago, the New York Times said, "That reputation is in tatters," because of EPA's repeated manipulation of science. As the Administrator, how will you restore the reputation EPA once had?

Response. Before I respond to your specific question concerning mercury and the recently promulgated Clean Air Mercury Rule (CAMR), I want to make sure that the Agency has been clear about the nature and sources of risk from mercury. We are exposed to methyl mercury through the fish we eat. Reduction of emissions from U.S. power plants may affect local freshwater ecosystems, but will not significantly reduce ocean concentrations. The importance of this point cannot be understated because the vast majority of fish and shellfish Americans consume come from ocean waters, and only a small portion of fish and shellfish consumed are freshwater recreationally caught fish. To suggest that there is a quick fix to the mercury problem in the U.S. would be misleading. EPA continues to recognize that fish and shellfish are part of a well-balanced diet that can contribute to heart health and children's proper growth and development. The best way for women of childbearing age, pregnant and nursing mothers, and young children to realize the benefits of eating fish and shellfish and be confident that they have reduced their exposure to the harmful effects of mercury is to follow the EPA-FDA Fish Advisory issued last year.

I am committed to achieving and maintaining the highest possible standards of scientific inquiry. On difficult science issues, the Agency turns to its internal scientific experts in the Office of Research and Development for review and advice and, as appropriate, look to outside panels of experts such as the Science Advisory Board and the National Academy of Science.

We have a strong program of scientific research and development. Over the past four years, EPA has taken major new steps to assure that its science is independent and sound. These steps have included open, transparent, and peer reviewed research planning; competitively awarded extramural research grants; independent peer review of science publications, assessments, and documents; and rigorous peer review of EPA's research laboratories and centers. If confirmed, I will work to en-

sure that this progress continues that the best available science is used in all of EPA's decision-making.

*Question 2.* The Superfund tax expired in 1995. The program is now essentially broke and must depend on appropriations each year, which have been steadily declining. New Jersey has the greatest number of Superfund sites in the country. We are also the most densely populated state. So, more kids are growing up living next to toxic contamination in New Jersey than anywhere. This is the first administration that has failed to support Superfund's "polluter pays" tax. Explain to me why we should let polluters off the hook by not reinstating the tax?

Response. I strongly support and enforce the "polluter pays principle" under the Superfund law. The success of the polluter pays principle is illustrated by the fact that roughly 70 percent of Superfund sites are cleaned up by the parties responsible for hazardous waste, an average of \$838 million per year to clean sites as mandated by EPA. A broader perspective shows that, over the history of the program, EPA has required responsible parties to spend more than \$21 billion on cleaning up contaminated properties.

EPA has always relied upon Congress to appropriate funds for the Agency to pay for cleanups at Superfund sites. Superfund program appropriations have remained relatively steady over the past 5 fiscal years at \$1.3 billion to \$1.5 billion. The FY 2006 President's Budget Request continues to maintain steady funding for the program.

The Agency is making significant progress in cleaning up Superfund sites. Unlike in previous years where smaller, less costly sites were targeted for cleanups, we are now addressing large and complex sites that present unique clean-up challenges. Cleaning up these sites requires a disproportionate share of Superfund money. I can assure you however, that new projects that are not funded have been secured, often have had prior cleanup work and pose no immediate threat. EPA will not put communities at risk and will continue to protect human health and the environment.

*Question 3.* The Toxic Substances Control Act was enacted in 1976 to "protect public health and the environment" from toxic chemicals. In nearly 30 years, TSCA has been used to regulate only five chemicals beyond PCBs, which were required to be phased out in the law. Children are the most vulnerable to toxic chemicals, and according to the CDC, 17 percent of all U.S. children less than 18 years of age have one or more developmental disabilities, which are increasingly tied to toxic chemical exposure. Toxic chemicals are a major concern in New Jersey. In 2000, New Jersey was ranked 15th highest in cancer deaths. Do you believe the Toxic Substances Control Act is fulfilling its mission "to protect human health and the environment" from toxic chemicals?

Response. As you know, TSCA provides the Agency with the authority to ban or otherwise control chemicals; to ensure that new chemicals and significant new uses of chemicals are reviewed prior to commercialization; to require testing on new chemicals and chemicals already in the marketplace; and to require the reporting of information needed to ensure an adequate understanding of potential risks and effective enforcement of the law.

In addition to the TSCA section 6 control regulations referred to in the question, it is important to note that EPA uses its TSCA section 5 authorities (to obtain pre-manufacture notification (PMN), to issue Significant New Use Rules (SNUR), and to regulate pending the development of information) to ensure assessment and needed regulation of new chemicals and significant new uses of new and existing chemicals. In this regard, we have reviewed over 36,000 PMNs and have restricted or otherwise regulated over 1600 of these chemicals while a similar number have been withdrawn by the manufacturer, often in the face of EPA action. In addition, we have issued SNURs covering approximately 700 chemicals, which require notification to the Agency prior to initiating a significant new use of the chemical.

EPA also complements its TSCA authorities with a wide range of voluntary testing, product stewardship and pollution prevention approaches to address potentially harmful chemicals. For example, EPA efforts in 2000 and 2004, respectively, resulted in the phase-out of production of over 80 Perfluorinated Chemicals (PFOS) derivatives and Octa- and PentaBDE by their only U.S. manufacturers. We also took a voluntary approach to obtaining a more complete understanding of High Production Volume (HPV) chemicals by challenging the U.S. chemical industry in 1998 to voluntarily provide basic health and safety information on more than 2,200 of the chemicals produced at more than a million pounds a year. We are currently on track to receive the data by the end of 2005 on over 1,400 HPV chemicals. The other 800 chemicals are being handled by a complementary international effort under the Organization for Economic Cooperation and Development. EPA's Green Chemistry and Design for the Environment Programs are examples of highly successful efforts

which seek the development and use of safer and more environmentally friendly chemicals and alternatives. Hospitals for a Healthy Environment and the Green Suppliers Network are examples of EPA programs which are obtaining significant reductions in the environmental footprint of, respectively, healthcare facilities and companies in manufacturing supply chains, like the automotive, pharmaceutical, and healthcare industries.

*Question 4.* According to the GAO, only two percent of the 60,000 chemicals grandfathered in under TSCA have even been examined for safety. Do you believe that TSCA give EPA the adequate authority to protect children's health from the harmful effects of the grandfathered chemicals?

Response. I can assure you that EPA takes very seriously its commitment to protect children from chemical risks. EPA has taken a number of steps under TSCA to protect children from the harmful effects of chemicals. In addition to the actions described in the previous question, the Agency complements its TSCA authority with a wide range of voluntary testing, product stewardship and pollution prevention approaches.

For example, in 2003, when the Agency amended its regulation for chemical production reporting, we included a requirement that industry provide us with additional information on chemicals produced in volumes over 300,000 lbs per site per year. Among the new reporting requirements is the need to identify chemicals that are intended for use in children's products or in consumer products. This will serve as an important source of valuable new information in our efforts to understand and protect children from chemical risks. In 2000, EPA initiated the Voluntary Children's Chemical Evaluation Program (VCCEP) by calling upon the chemical industry to participate in an effort to conduct tiered testing and assessment on chemicals to which children may be disproportionately exposed. Industry responded positively and VCCEP work is underway on 20 chemicals. This program is providing us with a greater understanding of the potential hazards, exposures, and risks to children associated with chemical exposures. Additional TSCA Titles give the Agency authority to address concerns related to the risks associated with asbestos, including asbestos in schools, and lead-based paint.

EPA has also taken action to deal with other TSCA chemicals, such as Perfluorinated Chemicals (PFOS) and PFOA, ingredients in the manufacture of a wide array of non-stick surfaces and products, which present concerns for developmental effects (among others), as well as other chemicals of potential concern such as Penta and OctaBDE. EPA has issued a SNUR requiring notification of new production of 88 PFOS derivatives and is currently considering similar actions on an additional approximately 180 PFOS derivatives. We recently released a preliminary risk assessment on PFOA which is undergoing peer review by the Agency's Science Advisory Board and we are using TSCA Section 4 testing tools, among others, to develop data needed to understand the sources and pathways of exposures to PFOA. Penta and OctaBDE are also the subject of proposed SNURs that would apply to any new production of these phased out chemicals. Finally, working with other Federal Agencies, EPA proposed adding a group of PFOS, PFOA, and PBDE derivatives to the Centers for Disease Control and Prevention's National Health and Nutrition Examination Survey (NHANES) blood monitoring study and we are working with the National Institutes of Environmental Health Sciences' National Toxicology Program to conduct a class study on the health effects of a series of perfluorinated acids similar to PFOS and PFOA.

*Question 5.* EPA has been internally discussing weakening the standard for how much nuclear radiation the public may be exposed to. For decades, EPA has required that the allowable concentration of radiation could pose a risk of no more one cancer in every ten thousand people. The new standard would weaken that standard to a cancer risk of 1 in 170, which is equivalent to getting 1,200 chest X-rays over a lifetime. The Administration may want to weaken this standard so that in the event of a dirty bomb, the cleanup would be easier to accomplish. I've been told that EPA is considering weakening its standard for radiation exposure. Is this true, and if it is, could you explain the reason for this change?

Response. EPA does not plan to weaken its standards for radiation protection. EPA has been working on revising a 44-year-old Presidential Guidance to Federal agencies for protection of the public. The current Federal Guidance, as signed by President Eisenhower, includes a cumulative public dose limit of 500 millirems/year, which is equivalent to a cancer risk of 3 in 100 excess cancers over a lifetime. EPA's main objective in revising the old Federal Guidance is to reduce this excessively high recommended dose limit, to be more realistic in light of the stringent single source standards that EPA and other Federal agencies have issued. The draft revised Guidance reinforces and strengthens the current public process used by Fed-

eral agencies for setting individual source limits. EPA continues to rely on the excess cancer risk range of no more than 1 in 10,000 excess cancers in a lifetime to manage cleanup of radioactive sites. In the event of a dirty bomb, EPA anticipates that its cleanup standards will be fully considered, along with other relevant federal standards, for appropriateness given the nature and extent of radioactive contamination.

*Question 6.* In a July 2004 Sierra Club report, *Communities at Risk, How the Bush Administration is Failing to Protect people's Health at Superfund Sites*, a report written using EPA data, New Jersey was highlighted as one of the key states which have:

1. Superfund sites where there is uncontrolled human exposure to dangerous chemicals (5 sites, and 14 more sites where there is not enough information to know for sure);

2. Superfund sites where toxic contaminants in migrating groundwater are not being controlled (22 sites, with 15 more sites where the information is incomplete).

When I met with you, you assured me that Superfund sites were being assessed and prioritized strictly based on human health criteria. Please explain to me what you plan to do to address the high risk conditions that exist at at least 27 Superfund sites in New Jersey, according to this report, and potentially far more, if all the data were available.

Response. I can assure you that protection of human health and the environment remains the Superfund program's top priority. You have my commitment that the Superfund program will continue to base its cleanup and funding decision-making on the risks posed by hazardous waste sites. Where immediate threats to human health identified, EPA takes action, such as providing alternative drinking water. EPA's Superfund Removal program is ready to act when there is an immediate threat posed by hazardous waste sites in New Jersey and throughout the country.

It is important to note that the Human Exposure environmental indicator addresses both actual and potential exposures. Therefore, many of the NPL sites, including the ones in New Jersey, that are characterized in the "not under control" category are not actually causing exposure.

Of the approximately 17 percent of NPL sites that are categorized as "not under control" or as "insufficient information", approximately 90 percent of those have Superfund actions under way to address or investigate the potential exposure. You have my commitment that EPA will continue to address the sites in New Jersey and elsewhere that are characterized as "not under control" or as having "insufficient information."

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RESPONSES OF STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS FROM  
SENATOR OBAMA

*Question 1a.* I understand that the EPA has been doing an excellent job thus far in leading the "Great Lakes Regional Collaboration," and that you personally have been committed to ensuring the success of this cooperative effort to develop a long-term strategy for the Great Lakes. Once the strategy is complete (expected December 2005), what steps will you take within EPA and with the Administration generally to help ensure that the strategy is implemented?

Response. Executive Order 13340 was signed on May 18, 2004, calling for the establishment of a "Regional Collaboration of National Significance" (GLRC) on the Great Lakes. EPA is working with the Regional Collaboration to develop the plan that is due to be released in December 2005. The Chair of the Interagency Task Force (IATF) is the EPA Administrator, who is a member of the Executive Committee of the Regional Collaboration. Through this role, EPA will assist to ensure that the plan is completed and a process is developed to implement the plan, report on progress, and take corrective actions, when necessary. EPA will also work with the Collaboration and with other Federal Agencies through the IATF, to develop mechanisms to carry out both programmatic and administrative requirements associated with the Executive Order, including the Regional Collaboration. We believe that continued bi-partisan support and leadership from Congress will be critical to our success.

*Question 1b.* Will EPA estimate the amount of investment it would take to restore the Great Lakes as part of this Collaboration? If so, when will that estimate be ready?

Response. As participants in the GLRC, EPA is working with other members to develop the strategic plan, including developing appropriate cost estimates associated with the plan. A draft plan is expected to be available in July. EPA will con-

tinue to work closely with this effort to ensure that appropriate cost estimates are developed.

*Question 2.* It is my understanding that scientists from the U.S. Geological Survey and Washington University in St. Louis have tested for mercury in East St. Louis. Their readings turned up some of the highest readings ever for mercury and that East St. Louis is a hotspot for mercury. I know that locals fish at both Horseshoe Lake State Park in Granite City and Frank Holten State Park adjacent to East St. Louis. Fish tissue sampling from Frank Holten showed high mercury levels. All area waters have fish advisories for mercury.

I am curious to know to what level these types of hotspots were incorporated into the EPA reasoning when formulating the mercury rule.

Response. I do not know if the results from the study that you reference were incorporated in the databases used for the exposure modeling in support of the final CAMR. The databases are extensive containing thousands of entries and I'm told that an immediate answer is not available but I commit to provide you with an answer as soon as possible. It is important to understand that most of that mercury in fish across the country comes from sources other than U.S. power plants and therefore would not be addressed through the CAMR rulemaking.

*Question 3.* It is my understanding that the CDC estimates that over 400,000 American children under age 5 have elevated blood-lead levels potentially affecting their cognitive abilities. A different study estimates that 20 percent of the children under 5 in Chicago have unacceptable blood-lead levels. Lead may cause a range of health effects, from behavioral problems and learning disabilities, to seizures and death. Children 6 years old and under are most at risk, because their bodies are growing quickly. I understand that EPA has been working on a rule for some time. Last year, however, EPA apparently decided that rather than following the law and requiring all relevant workers to be trained, EPA wants to have a voluntary program instead. This is a very troubling decision. Mr. Johnson, has EPA made the decision to abandon writing a rule on renovation and remodeling in favor of a voluntary approach? If so, what is EPA's scientific basis for believing that a voluntary program would be effective? What will EPA do if the results are not as good as projected? If not voluntary, when will EPA issue a proposed rule?

Response. EPA intends to work with the renovation and remodeling industry to increase the use of lead-safe work practices, which in turn will help us all to meet the goal of eliminating childhood lead poisoning. As part of this effort, the Agency is developing an education and outreach campaign that will convey the benefits of the use of lead-safe work practices to minimize both workers' and homeowners' exposure to lead dust during renovation and remodeling. EPA is also targeting outreach efforts to expand consumer awareness. Critical to creating demand for the use of lead safe work practices during renovation and remodeling is an educated consumer.

EPA plans to launch this material by this fall and will evaluate the effectiveness of this effort and will determine what additional steps may be necessary, including regulation.

*Question 4a.* In January 2001, under the leadership of the Clinton Administration, the EPA published a rule implementing clean diesel and fuel regulations. Engine manufacturers have invested hundreds of millions of dollars (Caterpillar Tractor Company more than \$1 billion alone) in technology to achieve a 99 percent reduction in diesel emissions. It is widely recognized and accepted that these unprecedented emissions standards cannot be achieved without a corresponding requirement to limit the content of sulphur in diesel fuel to 15 ppm or less. In fact, during the 2001 rulemaking, engine manufacturers argued the sulfur content of diesel fuel should be at or near zero. The Bush Administration has also been a strong advocate of the diesel standards. As I understand it, the oil and pipeline industry has requested that the EPA provide "flexibility" in implementing the EPA standards. Precisely what type of "flexibility" is sought by the oil, refining and pipeline industries?

Response. Refiners, pipelines, and terminals have expressed concern that despite their best efforts, during the initial transition into the program there may be "hiccups" that may lead to reduced volume of ultra-low sulfur diesel (ULSD). They have expressed a desire only for flexibility during the initial transition into the program in such limited situations that could both help ensure supply and availability of diesel fuel and avoid unnecessary enforcement issues.

*Question 4b.* How would granting this "flexibility" not jeopardize the investments made by companies like Caterpillar, all which based considerable research and development capital resources on a commitment made by the federal government?



Response. The Administration remains committed to full implementation of our highway and nonroad rules limiting emissions from diesel engines and fuels. We understand that engine manufacturers, including Caterpillar, have spent considerable time, effort, and financial resources on developing cleaner engines that require the use of the low-sulfur fuel. EPA is working with refiners and pipeline companies to ensure that they can meet our aggressive low-sulfur diesel fuel standards on time and in a manner that not restrict fuel supply, raise prices to consumers, or interfere with the investments made by engine manufacturers.

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STATEMENT OF LUIS A. LUNA, NOMINATED BY THE PRESIDENT TO BE ASSISTANT ADMINISTRATOR FOR ADMINISTRATION AND RESOURCE MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. Chairman and Members of the Committee, it is an honor to appear before you today as President Bush's nominee for Assistant Administrator for Administration and Resources Management for the Environmental Protection Agency.

The position oversees most of the assets and systems the Agency needs to do its work: personnel, training, facilities, security, purchasing, and grants administration. It is, in brief, an office responsible for many of the daily operations that make EPA run.

I believe the task before me would be straightforward: to provide EPA's 18,000 employees the tools they need to be successful, and to ensure that the resources you entrust to the Agency are used in appropriate ways. The goal of both of these endeavors, of course, is to implement the laws passed by Congress in a way that produces meaningful and cost-effective environmental improvements for our nation.

I would bring with me 32 years of experience in the Federal government, not-for-profit organizations and the private sector. During my career, I have had the opportunity to work for Senators and Members of Congress on legislative matters. I have served in four Federal agencies handling planning, performance and administrative issues. I have also helped created and run nonprofit organizations, as well as worked in the business community. These jobs have given me administrative and policy-development skills I would apply to the EPA post. They have also provided me an understanding of what it takes to develop and implement initiatives in organizations large and small, as well as an appreciation for the impact that Federal policies can have on the nation.

Should you and your colleagues grant me the high privilege of serving our country in this capacity, I will use three touchstones to guide me in my work: accountability, transparency, and results.

I will be accountable to the President, the Congress, the Administrator of EPA, my colleagues at the Agency, and most of all to the taxpayers. If I am asked to see that the Agency's resources are well managed, I must be willing to be held to account for my performance. This I will do. I will, in turn, also hold those with whom I work accountable, but always in a manner that is collaborative and constructive.

I will conduct my activities, and those of the office, with transparency. Administering EPA's resources is best done by ensuring that there is openness in the way decisions are made and issues are handled. From dealing with personnel matters to administering grants to purchasing supplies, it is vital to conduct our affairs in ways that are visible, understandable and credible. Only in that way can we hope to maintain the integrity of the outcome.

I will be focused on results. Activity is not the same as progress, and I will commit to pressing for solutions to issues. I will avoid policies and directives that ensnare our goals in bureaucratic procedures rather than forward motion, thereby wasting time and resources.

One area that will draw my particular attention is EPA's grants program. I know that this Committee has repeatedly questioned its operations. I am also aware of the conclusions drawn by the Government Accountability Office, the Office of Management and Budget and EPA's own Office of Inspector General regarding the management of EPA grants. I think these are legitimate concerns. It is essential that the \$4 billion EPA distributes in grants per year achieve the desired environmental results and are spent according to the rules. From what I read, that has not always been the case.

I am familiar with EPA's 5-year grants management plan. It outlines how to improve staff training, increase competition, make better use of technology, enhance oversight and focus on environmental results. All of these are appropriate and necessary steps. Although the Agency is in the midst of implementing the plan, I nevertheless intend to look at it with fresh eyes and adjust it as needed to ensure its success. I will test it against the principles I mentioned earlier: accountability, trans-

parency and results to see that it does, indeed, fully and effectively address the persistent challenges faced by EPA's grants program.

I hope this brief overview will give you insights into how I would manage the resources you provide to the Environmental Protection Agency. Thank you for considering my nomination and for allowing me the opportunity to appear before you.

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RESPONSES OF LUIS A. LUNA TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

*Question 1.* During an oversight hearing before the Environment and Public Works Committee held March 3, 2004, the EPA Assistant Inspector General for Audits testified to an audit of a nonprofit EPA grant recipient. In that audit, the Inspector General concluded the nonprofit recipient violated the Lobbying Disclosure Act for the 5-year term of the audit and recommended the EPA recover all grant dollars awarded to that nonprofit recipient during that period. EPA's new financial oversight for nonprofit grant recipients is a positive step. In order to avoid taxpayer dollars going to lobbying and political organizations, what would be wrong with requiring a potential nonprofit recipient to disclose all affiliated organizations including Internal Revenue Service designated 501(c)(4) and 527 organizations in the new financial oversight policy?

Response. I have read about this particular audit and can certainly see why it would give the Committee pause about the manner in which EPA grant dollars are being distributed. I believe the Agency should consider requiring nonprofit applicants to disclose their ties to affiliated organizations to which the funds could be transferred. This would mean changing the language of the questionnaire EPA currently sends to nonprofit grantees before they receive funding. That change would require clearance by the Office of Management and Budget (OMB) under the terms of the Paperwork Reduction Act. I would be happy to work closely with OMB on this issue.

*Question 2.* While EPA has instituted new oversight policies in grant management, this Committee's oversight has revealed that EPA needs a consistent peer review policy in grant solicitations and grant awards. I believe this Committee should consider hearings on this issue. Can I get your commitment to a real and thoughtful consideration of new peer review in grants focusing on resolving real environmental issues rather than wastefully spending on inconsequential ones?

Response. The short answer to your question is an emphatic "Yes." Peer review has great value in assuring that taxpayer dollars are used appropriately. I believe in the value of having many eyes look at projects and proposals, which helps both improve the outcome and avoid potential problems. It enhances accountability, transparency and results—the three concepts I said at my confirmation hearing would be the touchstones guiding my work at EPA.

I am aware that EPA's new competition policy encourages offices to use peer review-type processes to achieve the desired results. These processes range from using peer reviewers within EPA (or other Federal, state and local agencies) to reviewers from universities and the private sector. I am also aware that there is a pilot project underway to explore expanded use of paid peer reviewers on typical EPA grants. I will look at the information generated by this project, as well as the real-world application of the new competition policy, to see how best to get meaningful and cost-effective reviews of pending grants.

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STATEMENT OF JOHN PAUL WOODLEY, JR., NOMINATED BY THE PRESIDENT TO BE ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

Mr. Chairman, members of the committee, I want first to express my appreciation for promptly scheduling this hearing to consider my nomination to be the Assistant Secretary of the Army for Civil Works.

I am mindful of the confidence expressed in me by President Bush and Secretary Rumsfeld in submitting my name in nomination for this important post with the Department of the Army. The Army Corps of Engineers and its civil works function encompassing navigation, flood control, water resource development, and environmental improvement, has for 200 years contributed greatly to the prosperity and well-being of our Nation.

I deeply appreciate the courtesy of the committee. If confirmed, I look forward to working with the Chairman and all members of this important Committee to ad-

dress the vital navigation, flood control, water resource, and environmental challenges of the Nation. Thank you.

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RESPONSES OF JOHN PAUL WOODLEY TO ADDITIONAL QUESTIONS FROM  
SENATOR INHOFE

*Question 1.* When Congress authorized the Corps in WRDA 2000 to proceed with work on a comprehensive restoration of the Everglades, one concern at the time was that authorization of such a large restoration project was premature in part because the Corps had not yet identified measurable environmental outcomes. In response to these concerns, the Corps was required in the legislation to establish an independent scientific review panel to review the environmental progress (PL 106-541, § 601(j)(1)). In addition, the panel was required to produce a report to Congress every 2 years assessing the agency's progress in restoring the Everglades as measured by these environmental indicators (PL 106-541, § 601(j)(2)). Has the Corps convened this independent scientific panel?

Response. Yes Senator, the Corps has convened an independent scientific review panel through the National Academy of Sciences. The panel was convened in October of 2004 and is composed of twelve scientists with specialties that include: construction and environmental engineering, wetland scientists, water quality specialists, biologists in various specialties, geomorphology and hydrology, landscape ecology, and watershed management whose mission is to review the interim environmental goals and targets and report to Congress biennially on the progress in restoring the Everglades.

*Question 2.* Has the scientific panel identified the environmental indicators by which the Corps can measure its progress at restoring the Everglades?

Response. The panel has not come to a conclusion on the proposed environmental indicators to be used to measure the progress on restoring the Everglades. Since its inception, the Independent Scientific Review Panel has met twice, once in October 2004 and again in February 2005. A third meeting is scheduled for April 2005. The first meeting established a direction and an understanding of their objectives. The second meeting covered a wide range of topics associated with understanding the modeling, past science coordination, various goals for the Everglades and Florida Bay, land acquisition, and touring of portions of the project area. There was also an open public session for interested parties to address the panel. The third meeting will include tours of other portions of the project area, an update of the State's Acceler8 program, a review of the progress in the Southern Everglades, and experiments and results of adaptive management efforts with regard to experimental water deliveries and decompartmentalization. This meeting will be open to the public for input.

*Question 3.* How does the Corps expect to produce a 5-year progress report if it hasn't established the panel required to provide a scientific assessment of ecological measures of progress?

Response. The Corps is on schedule to produce the 5-year report to Congress as required by the Water Resources Development Act (WRDA) of 2000. This report will be based on the progress to date for both modeling and the interim goals, which have been developed, and the results of ongoing work with adaptive management. This report is a snapshot in time of where the project is at this time and will form the bases for studies over the next 5 years unless modifications result from demonstration projects on aquifer storage and recovery or directions identified through model revisions or results from the Independent Science Review Panel.

*Question 4.* When can we expect to see the first biennial report?

Response. Senator, the first biennial report of the Independent Science Review Panel is scheduled for June 2006.

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RESPONSES OF JOHN PAUL WOODLEY TO ADDITIONAL QUESTIONS FROM  
SENATOR JEFFORDS

*Question 1.* Do you support independent peer review of Corps projects?

Response. I fully support the independent review of major engineering, scientific, and technical work products that are a part of Corps of Engineers feasibility studies, particularly those that are a part of large, complex, and controversial Corps projects. Not all projects may require the additional time or expense of independent review and the Chief of Engineers should have discretion on studies that may be relatively routine, such as projects that are neither technically complex nor controversial. I

fully agree that providing for peer review of the major scientific, engineering, and technical work products that support the recommendation of the Chief of Engineers for implementation of water resources projects. It should not apply to the decision or recommendation itself or the application of policy to the recommendation. In this manner, the Chief of Engineers and I would retain the policy compliance or internal review aspect of the feasibility study as well as the responsibility to fully document the disposition of any recommendations resulting from independent peer review. To facilitate review of water resources reports, I have worked closely with the Corps to develop new guidance that establishes the principles of both internal and external peer review. Every proposed Corps project will undergo either an external or internal independent peer review on the technical aspects of the project or an internal policy compliance review. With respect to the National Research Council's (NRC) report, "Review Procedures for Water Resources Project Planning," I support their concept that "reviews should be conducted to identify, explain, and comment upon assumptions that underlie economic, engineering, and environmental analyses, as well as to evaluate the soundness of models and planning methods."

*Question 2.* Do you think the principles and guidelines that the Corps uses when evaluating projects need updating?

Response. I believe that the principles and guidelines provide the necessary flexibility to respond to today's challenges in addressing our Nation's water resources needs. I have worked with the Corps of Engineers to ensure that Corps planning studies will evaluate, display and compare the full range of alternative plans' effects across all four principles and guidelines accounts. Effects will include benefits and other desirable outcomes and costs and other adverse impacts, as well as cumulative effects. Planning reports will include a full discussion and display of the beneficial and adverse effects of each plan, and a comparison of effects among plans. The discussion and display will address each of the four established accounts and will not be limited to any one account. However, the National Economic Development (NED) plan will still be identified. After considering a plan's beneficial and adverse effects across all four accounts, the plan may be a candidate for selection if it has, on balance, net beneficial effects. The planning report will explain the basis for selection considering the beneficial and adverse effects in all four accounts. My office has the responsibility for granting or rejecting a waiver for selecting the NED plan based on the four accounts and the justification provided. I'm finding that on a day-to-day basis that the concepts and requirements established under the current principles and guidelines reflect a broad approach to today's water resources planning needs that enable us to work collaboratively with project sponsors, other state and Federal resource agencies, the public, as well as OMB and the Congress.

*Question 3.* In guidance the Corps of Engineers issued jointly with the EPA after the SWANCC decision, Corps of Engineers' field staff were directed to seek formal project-specific Headquarters approval prior to asserting jurisdiction over isolated water that are both intrastate and non-navigable, including permitting and enforcement actions. This direction gives complete discretion to the field staff to decide whether or not to regulate any isolated, intrastate non-navigable water and creates an additional step that could add unnecessary delay in permitting and enforcement. How is this working? How many permits have been effected by this guidance? How long is it taking for a permitting or enforcement action subject to the new Headquarters approval, to go through the process? What procedures are field staff using in order to get Headquarters approval?

Response. Corps districts are required to determine if Clean Water Act (CWA) jurisdiction exists over isolated, intra-state, non-navigable waters based on interstate commerce connections presented in 33 CFR 328.3(a)(3)(i)-(iii). Prior to asserting jurisdiction solely on the basis of 33 CFR 328.3(a)(3), the district is to request a concurrence from Corps and EPA HQ.

To date, approximately 10 actions (out of many thousands) have been raised to the Corps and EPA HQ by the districts. On average, the coordinated HQ review has been taking on the order of 6 to 12 months to complete. In some cases, it is taking longer than 12 months to complete the process. In part, this is because districts have not been provided with guidance to outline what information HQ is reviewing to support the district determination. As a consequence, coordination efforts between the district and the Corps and EPA HQ team have been extensive and resulted in actions being time consuming to complete. Additional delays have occurred as there is no mechanism in place to ensure both HQ agencies continue to process a decision to completion in a timely manner.

To that end, we have drafted a MOA to promote interagency cooperation, facilitate increased communication, and make more efficient the process for determining CWA jurisdiction for actions being review under 33 CFR 328.3(a)(3). The MOA outlines

the information to be submitted by the districts to request a HQ-level review and a process to ensure the request moves forward in a timely manner. We provided EPA with a draft copy of the MOA for review/comment on January 31, 2005. EPA provided feedback on the MOA in February 2005. It is expected that we will meet with EPA within the next couple of weeks on the MOA to determine how we move forward for processing actions covered under 33 CFR 328.3(a)(3).

*Question 4.* Since 1986, the Corps has been required to prepare a detailed mitigation plan whenever a civil works project will have more than minimal impacts. In 1990, Congress established a statutory goal for the Corps' civil works program of no overall net loss of the Nation's remaining wetlands base. However, a 2002 GAO Report shows that the Corps has not proposed any mitigation at all for 69 percent of projects constructed since 1986. Where mitigation is required, it is often at far less than a 1:1 acreage replacement despite the fact that the Corps and most states typically require the private sector to implement far more than 1:1 mitigation. Do you believe that the Corps should be required to meet the same mitigation requirements as the private sector (at least 1:1 mitigation and more for certain kinds of water resources damages)? If not, how do you plan to ensure that the Corps meets the Congressionally mandated goal of no-net-loss of wetland acres and functions?

Response. Mitigation is an integral part of the Corps of Engineers Civil Works and regulatory missions. The Corps goal is to fully mitigate for environmental impacts and to mitigate with habitat of the same kind (e.g., fresh water wetlands for fresh water wetlands) and of a value equal to or greater than that, which was impacted. This mitigation will be done prior to or concurrent with project construction.

The Water Resources Development Act of 1990 established an interim programmatic goal of no overall net loss of the Nation's wetlands by acreage and function (associated with mitigation) and a long-term goal to increase the quality and quantity (associated with restoration). Both the Corps' regulatory mission and Civil Works program have this as a goal for actions involving the Corps. To meet this goal, the Corps not only mitigates for its actions, but is also creating wetlands as part of its Civil Works restoration mission. Mitigation would only allow the Corps to offset the impacts of its programs or those they oversee. To achieve the long-term goal of increasing the quality and quantity of the Nation's wetlands, the Corps has implemented an ecosystem restoration program.

The President's no net loss goal is a national goal. Evaluation of impacts and mitigation using only acreage dimensions, applied on an individual project basis, can be misleading. For instance, under an acre for acre requirement an acre of high quality wetlands could be replaced with an acre of low quality wetland. Strict adherence to a no net loss of acreage requirement would, in that case, result in a net loss of environmental values. Value associated mitigation requires considerably more information than just the measure of area. What must be assessed is a measure of the physical/chemical/biological values associated the resource (wetland area, riparian area, upland area, etc.) to be impacted. The Corps' Civil Works program approach of looking at habitat value is consistent with the policies of the U.S. Fish and Wildlife Service (as described in the Federal Register, Volume 46, No. 15, dated January 23, 1981). All of U.S. Fish and Wildlife Service mitigation goals are stated with regard to habitat value. Accordingly, from an environmental perspective, the Corps' approach of replacing habitat value is more reflective of losses/impacts than a simple acre for acre approach.

Mitigation ratios that do not consider the value of what is being lost, are not reflective of good environmental stewardship. Using ratios without any other evaluation may lead to under or over mitigating project impacts, either of which is not in the public's interest. The Corps Civil Works program uses one of many differing habitat based evaluation procedures.

In general practice, functional values are determined by applying aquatic site assessment techniques generally recommended by experts and/or by the best professional judgment of federal and state agency representatives. These types of assessments fully consider ecological functions included in the Section 404 (b)(1) Guidelines. The objective in the guidelines for mitigating unavoidable impacts is to offset environmental losses. For wetlands and other special aquatic sites, such mitigation should provide, at a minimum, a one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan. In the absence of more definitive information on the functions and values of specific wetland sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values.

*Civil Works vs. Private Development:* I do believe the Corps should meet the same mitigation requirements as the private sector; however, mitigation as generally

practiced by Corps planners affects a much broader range of resources than does the Corps regulatory program, which applies to aquatic resources. The most visible mitigation attributed to the Corps regulatory program is the compensatory mitigation done for wetlands impacts. To the extent a Corps Civil Works project impacts wetlands, the Section 404 (b)(1) guidelines are applied to the project. Those projects are treated in the same manner as a private developer's project.

*Question 5.* In response to an advance question for your nomination hearing before the Armed Services Committee last Congress asking whether you believe we are currently meeting the no net loss of wetlands goal, you responded that you "understand there are differences of opinion on whether or not the Corps is meeting the goal." You also stated that you "understand that there are monitoring and record-keeping issues that should be addressed in this connection." Please describe the steps you have taken to determine whether this goal is in fact being met in connection with civil works projects, and the steps you have taken to address the lack of mitigation monitoring and record-keeping.

Response. Senator, let me begin by identifying the steps that have been undertaken in the Regulatory program. After the criticism of the Regulatory databases in the mid 1990s, Regulatory began development of a national database that would standardize permit tracking across all districts electronically. This resulted in an Operations and Maintenance Business Information Link (OMBIL) Regulatory Module (a database program) which allows the Regulator to input type, acreage, and functional score of the aquatic resources the proposed project would impact, what was permitted, and what was constructed on the ground as checked by compliance visits to the site. This system has been installed in 15 districts and should be installed in all districts by the end of FY 2007. However, Civil Works does not yet have a fully functioning database program. The Corps Institute for Water Resources (IWR) has developed a demonstration database program, which has been populated with data from the Continuing Authorities Program. A database for Civil Works is much more complicated in that it must cover a much broader range of natural resources than just aquatic resources in the Regulatory program. The amount of data to be collected and entered is significantly greater. The Corps has requested additional funds to verify its mitigation efforts, but these requests have not been funded by Congress. I firmly believe that the Civil Works program must have a fully functional database so it can be determined if the mitigation goals are achieved and I will work with the Corps to establish a fully functional database program for Civil Works through further work with IWR or working to incorporate Civil Works mitigation into the OMBIL database program.

I have requested substantial increases in the Corps' budget for the Regulatory program for both FY 2005 and FY 2006, predicated in part on the need to address the lack of mitigation monitoring and record-keeping.

*Question 6.* Do you think the programmatic responsibilities and guidance documents of the Army Corps of Engineers should include consideration of the impacts of sea-level rise related to global climate change?

Response. Senator, I fully agree that sea-level rise needs to be addressed in Corps planning studies. In fact current Corps guidance includes direction with regard to including sea-level rise in our planning studies. Engineer Regulation 1105-2-100, page E-142 states:

"k. Sea Level Rise. The National Research Council (NRC) study on sea level change (Responding to Changes in Sea Level: Engineering Implications, 1987) is a practical and rational review of data on relative sea level changes and the resulting impact on engineering structures. The study should be used by the Corps for technical guidance until more definitive data are available. The NRC study recommended that feasibility studies for coastal projects should consider the high probability of accelerated sea level rise. Since precise estimates of future sea level rise are unknown, the risks associated with a substantial rise should be addressed. Feasibility studies should consider which designs are most appropriate for a range of possible future rates of rise. Strategies that would be appropriate for the entire range of uncertainty should receive preference over those that would be optimal for a particular rate of rise but unsuccessful for other possible outcomes."

RESPONSES OF JOHN PAUL WOODLEY TO ADDITIONAL QUESTIONS FROM  
SENATOR BAUCUS

*Question 1.* Mr. Woodley, what percentage of barging activity on the Missouri River is related to Corps activities and what percentage is commercial traffic?

Response. The barging activity conducted by the Corps and its contractors for river maintenance (referred to as waterway materials), looking over a 5-year average, represents 1 percent of total commercial tonnage. Long-haul commercial tonnage, which does not include sand/gravel and waterway materials, represents about 8 percent of the tonnage on the Missouri River.

*Question 2.* Why do you believe that Congress has directed you to protect the barge industry on the Missouri River, and what does that mean? Where can I find your exact authorities? Don't you have a great deal of discretion in how you exercise your authorities along the river to maximize all uses of the river?

Response. Section 9 of the 1944 Flood Control Act authorizes the Missouri River Mainstem Reservoir System to be operated for the purposes of flood control, navigation, irrigation, power, water supply, water quality control, recreation, and fish and wildlife. Since navigation is a Congressionally authorized project purpose, I understand that the Corps is required to provide for navigation in its management of the system. I also understand that navigation does not have a priority position in system management, but must be balanced with other authorized project purposes. The Corps of Engineers operates the System following the guidelines that are identified in the Missouri River Master Water Control Manual, which was revised over a 15-year period involving extensive consultation to better balance the adverse impacts of drought to all of the project purposes. We do have a certain degree of discretion in operation of the system. During day-to-day operation of the System, the Corps may have very minor deviations from that identified in the Master Manual to respond to special considerations. These deviations are coordinated with the affected parties.

I reject the notion that the 2004 revision to the Master Manual is the last word in Missouri River management. The Corps has been and will continue to be engaged with the leaders and communities of the basin to address the baleful effects of drought and to help these communities achieve all the benefits available from wise management of this vast but fragile resource.

*Question 3.* Do you agree with the Corps' recent analysis which found that changing the navigation preclude to 40 million acre feet of system storage would have a net positive economic impact along the Missouri, and would have a minimal negative impact on the barge industry?

Response. The analysis of a 40-million acre-foot preclude determined that average annual Missouri River navigation benefits (based analysis used to derive a National Economic Development plan) would be reduced from \$9.35 million to \$9.26 million, a reduction of about 1 percent. Effects on navigation on the Mississippi River were not analyzed. Navigation on the Missouri River would be suspended earlier and benefits would be reduced in only the more severe droughts similar to the ones that occurred from 1930 through 1941 and from 2000 to the present. The Current Water Control Plan, which was first followed in 2004 following its revision in March 2004, provided an increase in the navigation preclude from 21 to 31 million acre feet. This change was accomplished following 14 years of analyses and communication, and it was supported by seven of eight basin states.

*Question 4.* I appreciate your recognition at the hearing that the situation at Fort Peck is serious. But, how much higher would Fort Peck currently be if the navigation preclude had been set at 44 million acre feet, and if the drought conservation measures contained in the current Master Manual had been in place during this current drought? How much higher at 40 million acre feet?

Response. I visited Fort Peck last year, and I can testify first-hand as to the devastating impact of the present drought on this important resource and the communities which depend upon it for their livelihoods and well-being. The severity of the current drought in the upper Missouri River basin is not well understood around the nation, in my view, and, if confirmed, I commit to work closely with you and other leaders to do all within my power to find a better way to lessen the impacts of drought on all parts of the Missouri River basin. Based on a cursory analysis, a 44-million acre-foot preclude with the current drought conservation measures would have resulted in no navigation in 2003. The estimated savings in terms of storage with both conservation measures would have been about 5.2 million acre feet, which would translate to an elevation change of about 8 feet at Fort Peck. Navigation would have occurred in all years of the current drought up to this year had the navigation preclude been set at 40 million acre feet and the current con-

servation measures followed throughout the drought. The current drought conservation measures, however, would have saved about 1.5 million acre feet of water in the system for an estimated gain of 2.5 feet at Fort Peck.

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RESPONSES OF JOHN PAUL WOODLEY TO ADDITIONAL QUESTIONS FROM  
SENATOR VITTER

*Question 1.* Mr. Woodley, the restoration of Coastal Louisiana is a top priority for me, for the other members of Louisiana's congressional delegation, and for the State of Louisiana. Once confirmed, how will you exercise your leadership and devote federal resources to restore coastal Louisiana and its wetlands?

Response. The restoration of Louisiana's coastal ecosystem is important to me, too, and I believe it is a top ecological priority for our country. The problems and potential solutions were recently addressed in the Louisiana Coastal Area (LCA) Ecosystem Restoration Study that my office recently received from the Corps of Engineers for review. That study identifies several actions that could be taken in the near term to address the problems of the coast, recognizing that actual restoration is likely to take several decades and will certainly require additional actions, which have not yet been fully studied or even proposed at this time. If confirmed, I will work tirelessly to secure the support of Congress the projects currently proposed. I will ensure the full participation of the Corps in implementing the actions that the Congress authorizes. In this regard, I have recommended an increase in funding for planning ecosystem restoration in coastal Louisiana to \$20 in FY 2006, which is included in the President's FY 2006 budget.

*Question 2.* In Louisiana, we have a coastal environment crisis: the state is losing a wetlands area equivalent in size to a football field every 38 minutes. This negatively impacts everyone in the nation who relies on resources supplied by Louisiana. Once confirmed, how would you respond to this problem? How would you support the State of Louisiana in responding to this problem?

Response. The scale of this problem is vastly larger than the more familiar wetlands issues encountered elsewhere. Despite that scale, the wetlands involved happen to be contained almost entirely within the borders of Louisiana. Nonetheless, the ecological and economic reality is that this is not simply Louisiana's problem. I believe that the Corps and the State of Louisiana have already identified the right path to ward the proper solution, which is an ongoing joint federal-state effort, involving multiple state and federal agencies, like the one that has recently produced the LCA Near Term Plan. I believe we need not only to provide for the projects recommended in the near term plan to be implemented as effectively and efficiently as possible, but also to provide the means and mechanism for the multi-agency planning process to continue. We should establish and equip an on-going effort to develop the science, the technologies, and the new plans that will be required in order to carry this effort into future decades. The Federal government and the State of Louisiana should be equal partners in this effort, supported by a multi-agency task force that can recommend the best, full use of our combined resources.

*Question 3.* As the Corps initiates restoration of Louisiana's coast how will it incorporate coordination and build partnerships with other federal agencies, such as EPA, the state, and local communities?

Response. I believe that an ongoing multi-agency task force should recommend the development, sequencing, and scheduling of restoration activities, as well as monitor their implementation and their overall effectiveness. The state and federal government, as equal partners in the restoration effort, should be supported on the task force and its workgroups by all the relevant agencies of their governments, as well as by other stakeholders as they might deem appropriate. While the Corps may be assigned significant responsibility for developing and implementing the plan, all of those agencies should have a role that reflects their responsibilities under the law, the resources they control, and the expertise that they can contribute toward the overall goals of the project.

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RESPONSES OF JOHN PAUL WOODLEY TO ADDITIONAL QUESTIONS FROM  
SENATOR LAUTENBERG

*Question 1.* The President's FY 2006 budget for Army Corps would make enormous cuts in flood protection projects which are of great importance to New Jersey—especially in view of the current flooding in 14 N.J. counties. Every flood control project in areas that are now literally under water, have been zeroed-out in the president's budget. More than 3,500 people have been evacuated so far and millions



of dollars in damage has been caused. Last year, New Jersey suffered similar flood devastation. Could you explain to me how the decision was made not to fund any of these clearly needed flood control projects?

Response. Given the President's overall priorities, including the ongoing War on Terrorism and the need to reduce the deficit, funding is not available to enable construction of all worthy Civil Works projects. To make best use of available funding, the construction portion of the Fiscal Year 2006 budget for the Army Civil Works program focuses on making substantial progress on high return projects. The predominant criterion that was used to identify the high return projects was the ratio of remaining benefits to remaining costs. This ratio ignores sunk costs and realized benefits, and compares the economic returns from prospective investments to the costs of realizing those returns. With the funding available for Fiscal Year 2006, we were able to fund ongoing construction projects with remaining benefit—remaining cost ratios of 3.0 to 1 or higher. Similar constraints affected the planning and design program.

I sincerely regret that the construction of some worthy projects and studies must be suspended or deferred, with the type of consequences that you describe. For future Civil Works budgets, I will, if confirmed, continue to do my best to seek the funding needed for worthy projects and studies, to ensure that the criteria for allocating available funds are fair and reasonable, and to ensure that cases where there are extraordinary or extenuating circumstances receive full consideration in the budget process.

*Question 2.* The President has proposed cutting shore protection funding by 32.3 percent compared to his FY 2005 proposal. The Administration has also adopted the position that the federal government no longer needs to assist coastal communities with beach protection. Yet, by law we've made a 50-year commitment to the beach projects that Congress has authorized. Do you believe the government should honor this commitment?

Response. The change in the total funding requested for shore protection from Fiscal Year 2005 to Fiscal Year 2006 reflects the sums of individual allocation decisions rather than an explicit decision about a shore protection total.

Both Fiscal Year 2005 and 2006 budgets included funding for initial construction of beach nourishment projects. Unlike the Fiscal Year 2005 budget, the Fiscal Year 2006 budget also includes a proposal to fund periodic renourishment at authorized storm damage reduction projects as needed to mitigate the effects of Federal navigation operation and maintenance on the nearby shorelines.

For projects involving periodic renourishment, the Administration's position remains that, once initial construction has taken place, renourishment to remedy shoreline impacts attributable to causes other than Federal navigation operation and maintenance should be a non-Federal responsibility.

The Army enters into a project cooperation agreement for each project once it receives construction funds. Every agreement explicitly recognizes that Federal financial participation is subject to the availability of funds for the project. The Administration's budget policy is reflected in the way funding in the budget is allocated or not allocated among available projects. Should a shore protection project that is not included in the budget be provided funds by Congress in annual appropriations, we would use those funds on the project as intended.

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STATEMENT OF MAJOR GENERAL DON TIMOTHY RILEY, NOMINATED BY THE  
PRESIDENT TO BE PRESIDENT AND MEMBER OF THE MISSISSIPPI RIVER COMMISSION

Mr. Chairman and Members of the Committee, I am honored to appear before you as the nominee for president and member of the Mississippi River Commission.

Mr. Chairman, I would like to make a brief statement about the Mississippi River Commission, the Mississippi River and Tributaries (MR&T) project, and my qualifications for the position for which I have been nominated.

The Mississippi River Commission, established by Act of Congress on June 28, 1879, consists of seven members, all of whom are appointed by the President of the United States subject to confirmation by the Senate. Three members are Corps of Engineers officers, one of whom serves as president; one member is from the National Oceanic and Atmospheric Administration; and three members are from the civilian sector, two of whom must be civil engineers. This unique blend of military personnel and civilians encourages an exchange of information and ideas from various points of view and the best professional advice to the President.

From its inception in 1879, the Commission has been charged with the vital task of planning and implementing a program of flood damage reduction projects and navigation improvements on the Mississippi River. More recently, project purposes

have been expanded to include environmental restoration. This task continues to be conducted in concert with the myriad political institutions, individuals, and public entities that have major interests in seeing that the water resources needs and opportunities of the Mississippi Valley are evaluated, planned, designed, constructed, and maintained. The current mission of the Mississippi River Commission is to balance the needs of flood control, navigation, recreation, and the environment in a sustainable manner.

As established in 1879, the Commissioners are to serve as advisors in planning and implementing water resource projects and programs on the Mississippi River between the Head of Passes below New Orleans to its headwaters. Since 1928, the Commission has spent a significant part of its leadership on the Mississippi River and Tributaries project, authorized by the Flood Control Act of May 15, 1928, to be implemented under oversight of the Commission. The MR&T project extends generally from the confluence of the Ohio River to the Head of Passes below New Orleans and covers portions of seven states. It receives water from all or portions of 31 states and part of two Canadian provinces, or roughly 41 percent of the contiguous United States. Effective planning, design, construction, and operation of the widespread and complex MR&T project have been assisted greatly by the Commission's active consultation with the public, particularly on its semiannual Mississippi River inspection trips, and by the high degree of professionalism that has been developed in its staff.

The MR&T project is truly of national significance. As a result of this project, damages have been reduced \$25 for each \$1 spent. For example, a major flood on the lower Mississippi River would have catastrophic effects on the inhabitants of the Mississippi Valley and the economy of the nation were it not for the protection provided by the levees and other flood control works throughout the project area. Many have noted that the comprehensive project on the lower river provided for passage of major floods in 1973, 1983, 1997, and other years without the extensive damage suffered in the upper river area during the 1993 and 1995 flood events.

In addition, the navigation features of the project are essential to maintaining the river for shipping import and export commodities between inland ports and world markets. In short, the navigation features of the MR&T project are essential in peacetime and vital to our national defense in times of emergency.

A reorganization of the U.S. Army Corps of Engineers in April 1997 placed the entire length of the Mississippi River within the Mississippi Valley Division of the Corps of Engineers. The Commander of this Division also serves as President of the Mississippi River Commission. The reorganization now allows management of the Mississippi River as a single, unified system and enables the Commissioners to more effectively serve as advisors to the Division Commander and the Chief of Engineers as authorized in the 1879 legislation.

The Commission members have been active as advisors to the Corps on the upper Mississippi River since the reorganization. The Commission has conducted annual inspection trips on the upper Mississippi River since August 1997 and has held a series of public meetings in the St. Paul, Rock Island, and St. Louis Districts each year. These meetings are in addition to the semiannual inspection trips and public meetings in the Memphis, Vicksburg, and New Orleans Districts. The high-water and low-water inspection trips encourage the MRC to listen to the sponsors, partners, general public, other federal agencies, and non-government agencies on a regular basis. The public meetings held during the inspection trips offer a vital forum for these groups and individuals to address their concerns and ideas. The MRC is also available to these groups and individuals during the downstream portions of the trips, site visits, and other events and meetings held off the Motor Vessel MISSISSIPPI during the inspection trips.

With regard to my personal qualifications, I have served as a member of the U.S. Army since I was commissioned in 1973. Prior to assuming command of the Mississippi Valley Division and becoming President Designee of the Mississippi River Commission, I served as the Deputy Chief of Staff, Engineer Headquarters, U.S. Army Europe based in Heidelberg, Germany. My troop assignments included duty as platoon leader, assistant, S-3, company executive officer, and company commander, 14th Engineer Battalion, Fort Ord, California; Commander, 7th and 17th Engineer Battalions; and other troop assignments detailed in my biography. In addition, I served as a Contract Construction Engineer for the U.S. Army Corps of Engineers Far East District in Korea.

As President Designee of the Mississippi River Commission since September 2002, I have accompanied the Commission on high and low water inspection trips of the Mississippi River and tributaries and have participated in the public meetings held by the Commission. This experience has given me considerable insight into the importance of the Mississippi River and its Tributaries as a National resource for

transportation and recreation. Also, I have come to understand and appreciate the need for a balanced, sustainable approach in resolving the often conflicting requirements for flood control, navigation, recreation, water supply and power generation, and environmental protection and restoration.

I am a native of California and received a bachelor's degree from the United States Military Academy at West Point in 1973. I later received a master's degree from the University of California in civil engineering in 1980. I am also a 1987 graduate of the U.S. Army Command and General Staff College, School of Advanced Studies, and the United States Army War College. I am a registered Professional Engineer in the state of California.

I believe my background and experience qualify me for an appointment to the Mississippi River Commission. If confirmed to the position, I commit to leading the continual, balanced improvement of the Mississippi River system and the MR&T project by recommending, through the Commission's oversight responsibilities, the application of the most modern practices in water resources engineering. I also look forward to being part of a Commission that focuses not only on the traditional roles of safely passing the Mississippi River Basin floodwaters to the Gulf of Mexico and providing a safe and dependable navigable waterway, but also incorporating programs and projects for recreation, and environmental protection and restoration.

For your information, I have attached a complete personal biography and a current list of members of the Mississippi River Commission.

This completes my prepared statement. I am pleased to respond to any questions.

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RESPONSE OF MAJOR GENERAL DON T. RILEY TO ADDITIONAL QUESTION FROM  
SENATOR INHOFE

*Question 1.* Flooding is still one of the major issues facing those living near the Mississippi, and an issue that confronts the Commission as well. One concern that has been raised with respect to flood control projects is how the Corps calculates benefits. Because of the type of economic inputs the Corps utilizes, it can frequently result in a project where flood control is justified for the middle and upper class neighborhoods in a community but is not justified for the poorer sections of a community. While the economic damage that flooding can cause is considerable, it is not the only concern, in fact, most people probably worry about their safety and the safety of their family than damage to property. For most other federal agencies, human health and safety are generally accorded the highest priority. I would be interested in your thoughts on how can we better integrate human health and safety issues in how the federal government sets flood control policy?

Response. The Corps is developing proposals to make our planning process more efficient and responsive to contemporary needs. Under current criteria, planning studies evaluate, display, and compare the full range of alternative plans' effects across all four Principles and Guidelines' accounts. These accounts include National Economic Development, Environmental Quality, Regional Economic Development, and Other Social Effects.

- plan may be a candidate for selection if it has, on balance, net beneficial effects.
- May select and recommend any one of the candidate plans
- The basis for selection will consider the beneficial and adverse effects in all four accounts),
- Must identify a National Economic Development Plan

The Corps has historically funded projects that have benefit to cost ratios (based on the NED account) greater than 1.0. The challenge will be to consider for funding projects with lower benefit to cost ratios that have higher outputs in the other three accounts.

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RESPONSES BY MAJOR GENERAL DON T. RILEY TO ADDITIONAL QUESTIONS FROM  
SENATOR VITTER

*Question 1.* Major General Riley, you testified on Coastal Louisiana issues when you served as Director of Civil Works for the Army Corps of Engineers. From your experience, could you highlight the opportunities featured in the LCA restoration plan?

Response. The LCA Ecosystem Restoration Program addresses the most critical restoration needs and consists of various components that could commence implementation in the near term. The Program recommends 15 near-term features aimed at addressing the critical restoration needs. The components currently recommended for authorization include five critical near-term ecosystem restoration features that could be implemented expeditiously, a science and technology program to decrease

scientific and engineering uncertainties and to further optimize efforts to achieve ecosystem restoration, a demonstration program consisting of a series of demonstration projects to evaluate the effectiveness of advances developed by the S&T Program through field applications, and a beneficial use of dredged material program to take greater advantage of using existing sediment resources made available by maintenance activities to build and nourish vital coastal wetlands. The five critical restoration features include:

- MRGO Environmental Restoration Features
- Small Diversion at Hope Canal
- Barataria Basin Barrier Shoreline Restoration
- Small Bayou Lafourche Reintroduction
- Medium Diversion with Dedicated Dredging at Myrtle Grove

The five critical near-term ecosystem restoration features, demonstration projects, and beneficial use of dredged material projects are all subject to the approval of feasibility level of detail decision documents by the Secretary of the Army.

The LCA Ecosystem Restoration Program also recommends ten additional near-term restoration features for further investigations, in anticipation that these features may be potentially recommended for future Congressional authorization as part of the program. The investigations would be conducted under existing authority and include:

- Multi-purpose Operation of the Houma Canal Lock
- Terrebonne Basin Barrier-Shoreline Restorations
- Land Bridge between Caillou Lake and Gulf of Mexico
- Small Diversion at Convent/Blind River
- Amite River Diversion Canal
- Medium Diversion at White's Ditch
- Stabilization of Gulf Shoreline at Pointe Au Fer Island
- Atchafalaya River Conveyance to Northern Terrebonne Marshes
- Modification of Caernarvon Diversion
- Modification of Davis Pond Diversion

In addition, a program to investigate the potential modification of existing water resources projects is also recommended in order to further restore the Louisiana coastal ecosystem. These investigations would focus on improving the environmental performance of existing projects.

And finally, several large-scale and long-term coastal restoration concepts that could potentially be recommended for future authorization beyond the near-term plan were identified and recommended for further investigations. These investigations will address the need to reduce coastal wetland losses and possibly achieve a net restoration. The studies and their resultant projects, if authorized and constructed, could significantly restore environmental conditions that existed prior to large-scale alteration of the natural ecosystem. The investigations include:

- Acadiana Bay Estuarine Restoration Study
- Upper Atchafalaya Basin Study
- Chenier Plain Freshwater Management and Allocation Reassessment Study
- Mississippi River Delta Management Study
- Mississippi River Hydrodynamic Model
- Third Delta Study

At October 2004 price levels, the currently estimated overall first cost of the LCA Ecosystem Restoration Program, which includes the components recommended for authorization, the related investigations and the ten additional future features, is \$1,996,500,000.

*Question 2.* From your experience, in what ways have you found the degradation of Coastal Louisiana to be of national significance to the nation's economy and national security?

*Response.* The conditions of current and continuing coastal land loss in coastal Louisiana leave the communities and businesses in south Louisiana in a position of ever increasing risk. Smaller tropical storms and hurricanes are inflicting escalating levels of damage with increasing frequency. The population base and business communities in south Louisiana support some of the nation's most significant resource industries - oil and gas production, commercial fishing in numerous forms, ship building and marine fabrication. If the degradation of coastal Louisiana wetlands is not addressed and the people and business operations in this part of the nation are impacted, not only will it be a threat of great individual and personal loss, but it will also be a tremendous loss to major industries and the nation.

- Louisiana contains one of the largest expanses of coastal wetlands in the contiguous U.S. and accounts for 90 percent of the total coastal marsh loss occurring in the Nation.
- Approximately 70 percent of all waterfowl that migrate through the U.S. use the Mississippi and Central flyways. With over 5 million birds wintering in Louisiana, the Louisiana coastal wetlands are a crucial habitat to these birds, as well as to neotropical migratory songbirds and other avian species that use the wetlands as crucial stopover habitat.
- Recent data from the U.S. Fish and Wildlife Services (USFWS) show expenditures on recreational fishing (trips and equipment) in Louisiana to be nearly \$703 million, and hunting expenditures were \$446 million for 2001.
- Louisiana's coastal wetlands and barrier island systems enhance protection of an internationally significant commercial-industrial complex from the destructive forces of storm waves and tides. Deep-draft ports in Louisiana, which includes the Port of South Louisiana, handle more tonnage than any other port in the Nation.
- Louisiana contains the most active segment of the Nation's Gulf Intracoastal Waterway (GIWW).
- In 2000, Louisiana led the Nation with production of 592 million barrels of oil and condensate (including the outer continental shelf (OCS)), valued at \$17 billion and was second in the Nation in natural gas production with \$1.3 billion (excluding OCS and casing head gas). In addition, nearly 34 percent of the Nation's natural gas supply and over 29 percent of the Nation's crude oil, moves through the state and is connected to nearly 50 percent of the U.S. refining capacity.
- Coastal Louisiana is home to more than 2 million people, representing 46 percent of the state's population. When investments in facilities, supporting services activities, and the urban infrastructure are totaled, the capital investment in the Louisiana coastal area total approximately \$100 billion.
- Excluding Alaska, Louisiana produced the Nation's highest commercial marine fish landing (about \$343 million) excluding mollusk landings such as clams, oysters, and scallops.

These economic and habitat values, which are protected and supported by the coastal wetlands of Louisiana, are significant on a National level.

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STATEMENT OF BRIGADIER GENERAL WILLIAM T. GRISOLI, NOMINATED BY THE  
PRESIDENT TO BE MEMBER OF THE MISSISSIPPI RIVER COMMISSION

Mr. Chairman and Members of the Committee, I am honored to appear before you as a nominee to become a member of the Mississippi River Commission.

Mr. Chairman, I would like to make a brief statement about the Mississippi River Commission, the Mississippi River and Tributaries (MR&T) project, and my qualifications for the position for which I have been nominated.

The Mississippi River Commission, established by Act of Congress on June 28, 1879, consists of seven members, all of whom are appointed by the President of the United States subject to confirmation by the Senate. Three members are Corps of Engineers officers, one of whom serves as president; one member is from the National Oceanic and Atmospheric Administration; and three members are from the civilian sector, two of whom must be civil engineers. This unique blend of military personnel and civilians encourages an exchange of information and ideas from various points of view and the best professional advice to the President.

From its inception in 1879, the Commission has been charged with the vital task of planning and implementing a program of flood damage reduction projects and navigation improvements on the Mississippi River. More recently, project purposes have been expanded to include environmental restoration. This task continues to be conducted in concert with the myriad political institutions, individuals, and public entities that have major interests in seeing that the water resources needs and opportunities of the Mississippi Valley are evaluated, planned, designed, constructed, and maintained. The current mission of the Mississippi River Commission is to balance the needs of flood control, navigation, recreation, and the environment in a sustainable manner.

As established in 1879, the Commissioners are to serve as advisors in planning and implementing water resource projects and programs on the Mississippi River between the Head of Passes below New Orleans to its headwaters. Since 1928, the Commission has spent a significant part of its leadership on the Mississippi River and Tributaries (MR&T) project, authorized by the Flood Control Act of May 15, 1928, to be implemented under oversight of the Commission. The MR&T project extends generally from the confluence of the Ohio River to the Head of Passes below New Orleans and covers portions of seven states. It receives water from all or por-

tions of 31 states and part of two Canadian provinces, or roughly 41 percent of the contiguous United States. Effective planning, design, construction, and operation of the widespread and complex MR&T project have been assisted greatly by the Commission's active consultation with the public, particularly on its semiannual Mississippi River inspection trips, and by the high degree of professionalism that has been developed in its staff.

The MR&T project is truly of national significance. As a result of this project, damages have been reduced \$25 for each \$1 spent. For example, a major flood on the lower Mississippi River would have catastrophic effects on the inhabitants of the Mississippi Valley and the economy of the Nation were it not for the protection provided by the levees and other flood control works throughout the project area. Many have noted that the comprehensive project on the lower river provided for passage of major floods in 1973, 1983, 1997, and other years without the extensive damage suffered in the upper river area during the 1993 and 1995 flood events.

In addition, the navigation features of the project are essential to maintaining the river for shipping import and export commodities between inland ports and world markets. In short, the navigation features of the MR&T project are essential in peacetime and vital to our national defense in times of emergency.

A reorganization of the U.S. Army Corps of Engineers in April 1997 placed the entire length of the Mississippi River within the Mississippi Valley Division of the Corps of Engineers. The Commander of this Division also serves as President of the Mississippi River Commission. The reorganization now allows management of the Mississippi River as a single, unified system and enables the Commissioners to more effectively serve as advisors to the Division Commander and the Chief of Engineers as authorized in the 1879 legislation.

The Commission members have been active as advisors to the Corps on the upper Mississippi River since the reorganization. The Commission has conducted annual inspection trips on the upper Mississippi River since August 1997 and has held a series of public meetings in the St. Paul, Rock Island, and St. Louis Districts each year. These meetings are in addition to the semiannual inspection trips and public meetings in the Memphis, Vicksburg, and New Orleans Districts. The high-water and low-water inspection trips encourage the MRC to listen to the sponsors, partners, general public, other federal agencies, and non-government agencies on a regular basis. The public meetings held during the inspection trips offer a vital forum for these groups and individuals to address their concerns and ideas. The MRC is also available to these groups and individuals during the downstream portions of the trips, site visits, and other events and meetings held off the Motor Vessel MISSISSIPPI during the inspection trips.

With regard to my personal qualifications, I have served as a member of the U.S. Army since I was commissioned in 1976. Prior to assuming command of the North-western Division, I served as the Deputy Director of Army Transformation in the Office of the Deputy Chief of Staff for Operation, Headquarters Department of the Army, Pentagon. My troop and unit assignments include duty as a Commander, 41st Engineer Battalion, 10th Mountain Division, Ft Drum, NY and Commander, 555 Engineer Group, Ft Lewis, WA. In addition, I served as a Project Engineer, Far East District, Corps of Engineers, in Korea, and Deputy Resident Engineer, Chief, Information Management Office, and Deputy District Engineer, New Orleans District, Louisiana.

As a Member Designee of the Mississippi River Commission since July 2003, I have accompanied the Commission on high and low-water inspection trips of the Mississippi River and its tributaries and have participated in the public meetings held by the Commission. This experience has given me considerable insight into the importance of the Mississippi River and its tributaries as a National resource for transportation and recreation. Also, I have come to understand and appreciate the need for a balanced, sustainable approach in resolving the often conflicting requirements for flood control, navigation, recreation, water supply and power generation, and environmental protection and restoration.

I am a native of New York and received a bachelor's degree from the United States Military Academy at West Point in 1976. I later received a master's degree from the University of Illinois in civil engineering in 1983. I am also a 1988 graduate of the U.S. Army Command and General Staff College, and a 1997 graduate of the Industrial College of the Armed Forces. I am a registered Professional Engineer in the State of Virginia.

I believe my background and experience qualify me for an appointment to the Mississippi River Commission. If confirmed to the position, I commit to leading the continual, balanced improvement of the Mississippi River system and the MR&T project by recommending, through the Commission's oversight responsibilities, the application of the most modern practices in water resources engineering. I also look

forward to being part of a Commission that focuses not only on the traditional roles of safely passing the Mississippi River Basin floodwaters to the Gulf of Mexico and providing a safe and dependable navigable waterway, but also incorporating programs and projects for recreation, and environmental protection and restoration.

This completes my prepared statement. I would be pleased to respond to any questions.

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RESPONSES OF BRIGADIER GENERAL GRISOLI TO ADDITIONAL QUESTIONS FROM  
SENATOR INHOFE

*Question 1.* A major concern on the Mississippi is the deteriorating condition of the navigation system. The impression is that the backlog of needed O&M repairs is growing every year. Do you feel that is the case?

Response. In times of such austere budgets, unfunded maintenance needs continue to grow. As a result we see increasing frequency and durations of emergency closures at U.S. Army Corps of Engineers locks and dams. The Operations and Maintenance, General program has not had sufficient funding to keep pace with age related repairs. The average age of locks on the Upper Mississippi River is about 50 years old. Age and high usage has caused the locks to deteriorate at a faster rate and the necessary funding has not increased at the same rate for needed repairs and major rehabilitation.

In order to combat this and minimize the impact of backlog, the Corps has met with the waterway users to prioritize our maintenance needs. This prioritization is based on risk and reliability on a system basis. That is, those items which have the highest likelihood of having the greatest impact are given priority for available funds.

*Question 2.* In an era of budget deficits, dramatic increases in federal spending, even in necessary spending, is easier said than done. In reality there is precious little extra money available to throw at the problem. Are there systemic or institutional changes that could be made to transform the incentives of both the agency and users?

Response. There is a need to combine the efforts of Federal agencies having responsibility in water resources to meet needs on a watershed basis. The U.S. Army Corps of Engineers is investigating the possibility of demonstration watershed studies to develop and sharpen skills which are necessary to do this. We also expect to develop collaborative procedures, look at necessary institutional arrangements, and leverage all sources of funding to accomplish this.

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STATEMENT OF D. MICHAEL RAPPOPORT, NOMINATED BY THE PRESIDENT TO BE A  
MEMBER OF THE BOARD OF TRUSTEES OF THE MORRIS K. UDALL FOUNDATION

Mr. Chairman, Members of the Committee, my name is David Michael Rappoport of Scottsdale, Arizona and I am Associate General Manager for Public & Communications Services at the Salt River Project, a public utility providing electricity and water to much of the Metropolitan Phoenix area. In that capacity, I am responsible for community, corporate and government relations as well as communication, consumer and education services.

Thank you for this opportunity to present myself as a Presidential nominee for the position of Trustee of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation. It is a particular privilege for me to be nominated by President Bush to serve another term on the Foundation's Board of Trustees.

I would also like to express my appreciation to Senator John McCain and Senator Jon Kyl for their letters to the Committee on my behalf. If appropriate, I request that they be included in the hearing record.

My association with Mo Udall extends back more than 30 years to a time when he was instrumental in building support for the Central Arizona Project, a major water supply system of energy, pumping and canal facilities. It continued through public policy activities involving land use planning, surface mining and reclamation, Indian water rights, the safety of Federal dams and several wilderness proposals.

In the early years, the interests I represented were not always in total agreement with the positions so effectively advocated by Mo. But for most of our association, I was among the many who supported his leadership on a variety of issues of national import. In later years, I had the good fortune to either chair or serve on one of Mo's Business Advisory Committees, Energy and Water Task Forces as well as several of his re-election committees. And, like so many others, I came to admire

his sense of civility, his ability to fashion consensus and above all, his integrity and commitment to public service.

When Congress established the Udall Foundation it gave special tribute to these qualities. Specifically, in 1992 Congress authorized to be appropriated \$40 million to the Morris K. Udall Scholarship and Excellence in National Environmental Policy Trust Fund. To date, approximately \$31 million has been appropriated for deposit into the fund. By law, we are required to invest monies appropriated in public debt securities.

It is important to note that the Foundation operates primarily on the interest earned from those investments and on a modest annual appropriation. As Chairman of the Foundation's Management Committee, I oversee those investments as well as the Foundation's dedicated professional staff.

Basically, the funds are administered by the Foundation to, among other things:

- Award scholarships, fellowships, internships and grants for study in fields related to the environment, Native American and Alaska Native policy;
- Develop resources to train professionals in the fields of environmental, Native American and Alaska Native health care and tribal public policy; and
- Establish a Program for Environmental Policy Research and Environmental Conflict Resolution in the Udall Center located at the University of Arizona.

On behalf of the Foundation Board of Trustees, I am pleased to report that since we began in 1994, the Foundation has:

- Awarded 755 scholarships and 18 Ph.D. fellowships to outstanding students in all 50 states, Guam, Puerto Rico and the District of Columbia;
- Administered 114 internships for Native American and Alaskan Native college students pursuing careers in health care and tribal public policy;
- Hosted seven major conferences and forums on contemporary environmental and Native American issues; and
- Sustained support for the University of Arizona Udall Center for Studies in Public Policy.

In addition, the Foundation, based in Tucson, Arizona, is home to the U.S. Institute for Environmental Conflict Resolution, created by Congress in 1999 to provide mediation and other alternative dispute resolution services. Today the Institute is regarded both in and out of government as a trusted convener of diverse parties engaged in difficult environmental controversies.

Also located within the ambit of the Foundation is the Native Nations Institute for Leadership, Management and Policy, which provides educational opportunities and planning resources for tribal leaders. Both the Foundation and the University of Arizona are especially proud of our collaboration in this unique and noteworthy endeavor.

Mr. Chairman, I am here to assure you and the Committee that the Foundation is completely committed to carrying out the purposes intended by Congress. Also, I am pleased to report that the results of an independent audit conducted by Clifton, Gunderson LLP, dated November 30, 2004 concluded, among other things, that the Foundation's balance sheets and related statements as of September 30, 2004:

“Present fairly, in all material respects, the financial position of the Foundation . . . in conformity with accounting principles generally accepted in the United States of America.”

Further, I am pleased to report that the necessary management controls are in place.

In closing, I would suggest that the Foundation's purposes have been best captured by Mo's own words of a few years ago:

“America is never done like a poem or a painting. . . .”

All of us at the Foundation believe we are well on the way to helping future generations care enough to change things. I would welcome the opportunity to serve another term as a Udall Foundation Trustee to continue to help meet that challenge.

That concludes my statement. I am prepared to answer any questions the Committee may have at this time. Also, I am willing to appear at the request of any duly constituted committee of Congress as a witness. Finally, I know of no matters currently that would put me in a conflict of interest with the Board of Trustees should I be confirmed by the Senate.

Mr. Chairman, I have with me the Foundation's recently released 2004 Annual Report. With your permission, I would like to submit copies of it for appropriate reference.

Thank you.



RESPONSE OF D. MICHAEL RAPPOPORT TO ADDITIONAL QUESTION FROM  
SENATOR INHOFE

*Question.* You have now been a member of the Foundation for several years. Based on your experiences, what is your assessment of how the Foundation operates; what in your view have been some successes of the foundation; and if it needs changing, what would be your suggestions for doing so?

*Response.* In my opinion, and I believe it is a view anchored in both empirical and perceptual evidence, the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation (Foundation) operates very efficiently producing noteworthy results with relatively modest annual appropriations by the Congress. Since the Foundation began operating in 1994, it has:

- Awarded 755 scholarships and 18 Ph.D. fellowships to outstanding students in all 50 states, Guam, Puerto Rico and the District of Columbia;
- Administered 114 internships for Native American and Alaska Native college students pursuing careers in health care and tribal public policy;
- Hosted seven major conferences and forums on contemporary environmental and Native American issues.

Created by Congress in 1999, the U.S. Institute for Environmental Conflict Resolution (Institute) has provided mediation and alternative dispute resolution services in more than 300 cases. The Institute's annual appropriation has been on the order of \$1.3 million for the last several years and it continues to generate revenue from services provided

Congress also authorized the Foundation to transfer a portion of its annual appropriations, beginning in FY 2001, to the Native Nations Institution (NNI) which has provided executive education to more than 1,000 councilors, presidents and senior managers from over 100 Indian nations. In partnership with the Harvard Project on American Indian Economic Development the NNI has developed key research and strategic assistance on tribal economic development, leadership and self-determination.

Clearly, in view of the strong success of the Foundation, Institute and NNI and our dedicated professional staff, I personally have no operational changes to recommend at this time.

RESPONSE OF D. MICHAEL RAPPOPORT TO ADDITIONAL QUESTION FROM  
SENATOR JEFFORDS

*Question.* The U.S. Institute for Environmental Conflict Resolution is an integral part of the Udall Foundation. Through its first 5 years, the Institute was involved in more than 300 cases and projects in 35 states to provide mediation, facilitation and related services to assist in resolving federal environmental conflicts. I applaud the Institute and wish it continued success. Do you think it would be appropriate for Congress, and this Committee in particular, to call on the Institute directly to mediate discussions with key stakeholders in an effort to reach consensus on legislative issues under consideration?

*Response.* Generally speaking, and on behalf of the Foundation, the Institute would welcome the opportunity to respond to any Congressional requests for assistance in finding a consensus among diverse interests engaged in difficult environmental controversies. However, in my opinion, there may well be two constraints on the Institute's ability to assist Congress as posed in the question.

First, the Institute is within the executive branch of the federal government, and it is currently authorized to assist in resolving disputes that involve a federal agency and concern the environment, public lands or natural resources. The Institute would be able to mediate discussions with key stakeholders related to legislative issues if a federal agency were involved so long as Congress believed there were no separation of power issues.

The second limitation is funding. The Institution's funding includes a small appropriation (\$1.3 million a year since FY 2002) and also fees for its services (approximately \$750,000 net of expenses in FY 2004). While the Institute would be pleased to assist Congress, any new projects would require attendant funding through fees or appropriations.

I would be pleased to bring together the appropriate Foundation and Institute staff with any representatives of the Committee to respond further to this question.

STATEMENT OF MICHAEL BUTLER, NOMINATED BY THE PRESIDENT TO BE A MEMBER  
OF THE BOARD OF TRUSTEES OF THE MORRIS K. UDALL FOUNDATION

Mr. Chairman, thank you for this opportunity to address the record regarding my appointment by President George W. Bush to the Board of Trustees of the Morris K. Udall Foundation for Scholarship and Environmental Excellence in National Environmental Policy. I appreciate the opportunity to testify in writing, and I am willing to appear at the request of any duly constituted committee of Congress as a witness.

Concerning my ability to serve, I know of no matters currently that would put me in a conflict of interest with the Board of Trustees should I be confirmed by the Senate.

Secondly, my experience and education have prepared me to serve in the capacity of board trustee. As the executive director of a 60-year-old wildlife and conservation non-profit in Tennessee, I am thoroughly familiar with non-profit organizational management, budgetary processes, and board duties, both fiduciary and volunteer.

Additionally, as a classically trained wildlife biologist and former Director of Conservation for the Tennessee Conservation League, I have worked in several areas similar in scope to the work of the Foundation, particularly in natural resource conflict-resolution efforts, the creation of successful natural resource policy, and support of natural resource education programs.

The Udall Foundation provides a valuable national service, as the environmental challenges facing our country require workable solutions. It is Morris K. Udall's commitment to civility, integrity, and consensus that makes the Foundation's approach to environmental challenges so vitally important.

I consider it an honor to be selected to serve on this board, and look forward to furthering the work of the Foundation. Should you or any member of your committee wish to contact me, please feel free to do so at your convenience.

